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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted]50

CARL S. VICTOR,

Appellee,

v.

LYON ASSOCIATES, INC. and GEORGE W. DRYSDALE,

Defendants,

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this as its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment in question and should exercise such jurisdiction in this case.

Opinions Below

The New York Court of Appeals did not render opinions in the subject case, but affirmed, 21 N.Y. 2d 695 (1967), upon the opinions in the case of *Simpson* v. *Loehmann*, 21 N.Y. 2d 305 (1967), as follows:

In *Victor* v. *Lyon Associates, Inc.*:

> "Order affirmed, with costs, upon the opinion of Fuld, Ch. J., in *Simpson* v. *Loehmann*, decided herewith. Question certified answered in the affirmative. All concur, Keating and Breitel, JJ., on the grounds stated in their respective concurring opinions in *Simpson* v. *Loehmann*, and Bergan, J., on the grounds stated in the concurring opinion by Breitel, J., in *Simpson* v. *Loehmann*, except Burke and Scileppi, JJ. who dissent and vote to reverse on the grounds stated in the dissenting opinion in *Simpson* v. *Loehmann*.

The opinions of the New York Court of Appeals in *Simpson* v. *Loehmann* are contained in Appendix "A". An opinion was entered in this action in Special Term, Part I, Supreme Court, New York County by Justice Thomas Chimera upon rendering the initial order denying the motion to vacate the levy of attachment of the contingent duties of appellant Hanover Insurance Company of New York [Hanover] under its policy of liability insurance. A copy of the opinion of Justice Chimera is also attached as Appendix "B". The judgment of the New York Court of Appeals dated December 29, 1967 from which this appeal is taken is quoted above.

Jurisdiction

This appeal is from a final judgment of the Court of Appeals of the State of New York affirming the decrees of the lower courts denying appellant's motion for an order vacating the levy of attachment of its contingent duties under a policy of liability insurance.

The final judgment appealed from was made and entered on December 29, 1967. Notice of Appeal was filed with the Clerk of the Supreme Court of the State of New York, County of New York, the Court possessed of the record, on January 25, 1968.

The Supreme Court has jurisdiction to review by appeal under the provisions of 28 U.S.C. §1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review on appeal:

Local 438 Construction Laborers' Union v. *Curry,* 371 U.S. 542, 9 L.ed. 2d 514, 83 S. Ct. 531 (1963);

Mercantile National Bank v. *Langdeau,* 371 U.S. 555, 9 L.ed. 2d 523, 83 S. Ct. 520 (1963);

Rosenblatt v. *American Cyanamid Co.,* 15 L.ed. 2d 39, 86 S. Ct. 1 (Mr. Justice Goldberg in Chambers) (1965);

Mills v. *Alabama,* 384 U.S. 214, 16 L.ed. 2d 484, 86 S. Ct. 1434 (1966).

The New York Court of Appeals affirmed the validity under the Constitution of the United States and amendments thereto of Sections 5201(a) and 6202 of the New York Civil Practice Law and Rules, as construed in *Seider* v. *Roth,* 17 N.Y. 2d 111 (1966), and applied in this action to allow the levy of attachment of the appellant insurer's

contingent duties as "debts" to stand. The pertinent sections are:

§6202—"DEBT OR PROPERTY SUBJECT TO ATTACHMENT; PROPER GARNISHEE. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'."

§5201—"DEBT OR PROPERTY SUBJECT TO ENFORCEMENT; PROPER GARNISHEE.

(a) DEBT AGAINST WHICH A MONEY JUDGMENT MAY BE ENFORCED. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state."

Questions Presented

CPLR §6202 provides that any debt against which a money judgment may be enforced under CPLR §5201 is subject to attachment. CPLR §5201(a) defines such debt as one " . . . which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . ." In *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966), the New York Court of Appeals, without consideration of constitutional issues, held that the duties of an insurer to an insured under a liability policy were "debts" under CPLR §5201(a) and were subject to attachment under CPLR §6202. The duties referred to in *Seider* included the duties to investigate, negotiate and, if expedient, settle, to defend and to indemnify. In the present case and in *Simpson* v. *Loehmann, supra* the New York Court of Appeals upheld the application of these CPLR provisions to the duties of an insurer, rejecting the constitutional objections which were submitted to it for the first time. The principal questions presented are:

1. Whether CPLR §§5201(a) and 6202, as construed in *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966) and applied here, are unconstitutional under the due process clause of the Fourteenth Amendment because an attachment made thereunder:

   (a) imposes a jurisdiction which violates traditional notions of fair play and justice under our federal system;

   (b) destroys contractual rights of the insurer and insured and transforms contingent, non-monetary promises contained in a foreign liability insurance policy into absolute debts thereby depriving the insurer of property inequitably;

(c) in reality constitutes a judicially enacted right of direct action against the insurer applicable to foreign causes of action and to foreign policies of insurance in which New York has no substantial interest.

2. Whether CPLR §§5201(a) and 6202 as so construed and applied constitute an unreasonable burden on interstate and foreign commerce.

Statement of the Case

Effective June 17, 1965, the branch office of American International Underwriters Corporation [AIUC] at Naha, Okinawa, issued, as Home-Foreign Manager for Hanover, an automobile liability insurance policy to Lyon Associates, Inc. located at Koza, Okinawa. The policy coverage was limited to the geographical areas of the Ryukyu Islands, Formosa, Japan, Thailand, Korea, South Vietnam and Cambodia. The limit of liability for personal injury to any one person was $20,000. All negotiations for the policy took place in the Far East.

On December 21, 1965, Carl S. Victor allegedly sustained personal injuries at Da Nang, South Vietnam as a result of a collision between a Honda motorcycle driven by him, but owned by one George S. Bishop, and a truck owned by Lyon Associates, Inc.

Victor commenced an action *quasi in rem* against Lyon Associates, Inc. in New York seeking $750,000 in damages by obtaining an order of attachment in the Supreme Court of the State of New York, County of New York and directing the Sheriff of the City of New York to levy attachment on the aforementioned liability policy by serving

copies of the attachment order on AIUC and Hanover. Upon motion in Special Term, the levy was vacated as to AIUC, but sustained as to Hanover. The opinion of Judge Chimera dated December 8, 1966 is appended hereto [Appendix "B"]. The order of Special Term was affirmed by the Appellate Division of the Supreme Court, First Department, 28 AD2d 672, but leave was granted to Hanover to appeal to the New York Court of Appeals, which, by judgment dated December 29, 1967, affirmed the lower courts' decisions.

The only basis for the attachment is the mere fortuity that Hanover does business in New York. The policy was issued in Okinawa; the parties were all present and acting in Vietnam where the accident occurred; and Lyon Associates, Inc., a Maryland corporation, has no connection with New York.

The attachment has bizarre consequences:

1. Under CPLR §320 a general appearance is required in order to contest an action commenced *quasi in rem* on the merits. The ad damnum in the complaint is $750,000, a sum far in excess of the $20,000 policy limit of coverage. In the circumstances, Lyon Associates, Inc., rather than submit itself to unlimited personal liability in this foreign forum, has refused to allow Hanover to appear and contest on the merits. In the circumstances, Hanover cannot appear for Lyon Associates, Inc. to defend on the merits without exposing itself to liability for any judgment in excess of its policy limit of $20,000. Hanover, therefore, has no choice but to default, if the attachment stands, losing all or part of its property, the $20,000 policy limit.

2. Under CPLR §6214(b) the garnishee, Hanover, ". . . is forbidden to . . . pay over or otherwise dispose of

any such debt to any person other than the sheriff or pursuant to an order of the Court." This provision prohibits Hanover from discharging its "duties" under the policy. Therefore, even if Lyon Associates, Inc. consented, Hanover is enjoined from discharging its duty to defend this action or any other action. See, Siegel, Supplementary Practice Commentary, 1967 Cum. Pocket Part, 7B McKinney's Civil Practice Law and Rules §5201, pp. 14, 15.

3. Aside from the "duties" of Hanover to Lyon Associates, Inc. purportedly arising at the time of Victor's accident, the levy is also presumably effective as to all "debts" owing to the insured defendant by the garnishee. This means, if the attachment thesis is to be logically followed, that the duties of Hanover to Lyon Associates, Inc. arising out of the claim of Bishop for damage to his motorcycle in the Victor accident and out of unconnected accidents covered by the subject policy and a Contrators' & Manufacturers' Liability policy also issued to Lyon Associates, Inc. are attached. Pursuing the attachment rationale to its incredible conclusion, Victor can satisfy any judgment he obtains out of these unrelated duties and deprive the other claimants of the protection of Hanover's coverage.

4. The various reciprocal promises, referred to by the New York Court of Appeals as "duties", are contingent in nature. For example, the duty to defend ". . . does not arise until suit against the insured has been commenced . . ." 3 Richards on Insurance, §421, p. 1390 (5th ed., 1952). Under the *Seider* decision, however, the duty can be attached to satisfy the very condition, *i.e.*, commencement of suit, that kept the duty from maturing. More importantly, the duty to indemnify does not arise until there has been an adjudication that the insured is obligated to pay damages. This contingency and the con-

ditions precedent contained in the "No Action" clause of the policy[1] are voided by the *Seider* rule.

Other illogical and impractical consequences of the *Seider* rule are discussed in the concurring opinion of Judge Breitel and the dissent of Judge Burke in *Simpson* v. *Loehmann,* Appendix "A", in the several Practice Commentaries in 7B McKinney's Civil Practice Law and Rules §5201 and in critical articles in periodicals, *e.g.,* Note, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Col. L. Rev. 550 1967); Willis L. M. Reese, The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild, Insurance Counsel Journal, January, 1968, p. 118; David D. Siegel, Simpson Upholds Seider—Problems For Both Sides, New York Law Journal, January 23-25, 1968, p. 1, col. 4.

The Questions Presented are Substantial

The constitutional questions posed by this appeal go to the very heart of jurisdictional due process and the role of the individual state in our federal system.

The *Seider*-type attachment has already been found to be an unconstitutional violation of due process in two unreported lower court cases decided since this case and *Simpson* v. *Loehmann—Podolsky* v. *Devinney,* —— F. Supp.—— (SDNY, 1968) and *Vaage* v. *Lewis,* —— AD2d ——, New York Law Journal March 27, 1968, p. 1, col. 1 (2nd Dept., 1968). Copies of the opinions in both cases are attached

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[1] "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

as Appendix "C". Even a cursory reading of the four opinions in *Simpson* v. *Loehmann* indicates that none of the judges really approve of the *Seider* attachment and that a majority would vote to overrule *Seider,* but for undue concern for "institutional stability" of the Court.

This appeal raises at least three serious due process problems. The first is whether the doctrine of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945) extends to *quasi in rem* jurisdiction. When considered in the light of the expanded *in personam* jurisdiction available under modern "long arm" statutes, it is submitted that the *International Shoe* rule should so extend, particularly with respect to intangible debts of multistate corporations. See, Reese, The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild, *supra.* Applying the *International Shoe* rule that jurisdiction must be fair to the parties and reasonable in the context of our federal system to the present case, the result must be a finding that the attachment violates due process.

Due process is also concerned in determining the constitutionality of New York's interference with contractual property rights of the parties to the insurance contract. The contract was entered into outside of New York and New York has no real interest in either the contract or the cause of action. Despite this, New York has, by the attachment here, converted non-monetary, non-transferable, contingent promises into mature debts subject to arbitrary monetary valuation and completely negated other provisions, such as the "No Action" clause. Appellant submits that this results in an unconstitutional deprivation of the property of the insurer and the insured. *Home Insurance Co.* v. *Dick,* 281 U.S. 397 (1930).

Another significant due process consideration is the limit on the ability of a state to impose on an insurer a direct

liability for causes of action covered by liability insurance. As Judge Keating candidly admits in his concurring opinion in *Simpson*, the real intent of the Court of Appeals is to enact judicially a direct action statute in New York applicable to foreign causes of action involving foreign parties arising under foreign policies of insurance. It appears that in so doing New York has exceeded the due process limits set forth in *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). The burdens imposed upon the insurance industry by such direct action also raise a companion question as to its validity under the commerce clause of the United States Constitution, Article 1, §8 Cl. 3.

The constitutional issues at stake in the subject appeal are of grave importance not only to the insurance industry, but to the insuring public and to injured parties. While the issues remain open, the insurance companies are unable to determine their liabilities in the state of New York on foreign policies and causes of action and are faced with multiple claims and impending chaos when other states adopt the same device. The insurers are also faced with the prospect of entry of default judgments in those instances where the insureds refuse to submit to unlimited personal jurisdiction in New York. The insured is faced with the prospect of loss of insurance protection for lack of cooperation, if he does not agree to submit to personal jurisdiction in New York so as to allow a defense on the merits; and, if he does so agree, he faces the prospect of litigation in a foreign forum noted for its high verdicts, the attendant inconvenience to himself and his witnesses and the risk of a judgment exceeding the limits of his policy. These issues, therefore, should be resolved without delay to remove the uncertainty now existing.

CONCLUSION

The Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).

Respectfully submitted,

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APPENDIX "A"

Statement of Case

WILLIAM SIMPSON, as Father and Natural Guardian of MICHAEL SIMPSON, an Infant, et al., Respondents, *v.* FRED LOEHMANN, Appellant.

Argued November 1, 1967; decided December 29, 1967.

Attachment — attachment of "debt" — contractual rights of nonresident insured under liability policy issued by insurer doing business in New York constitute attachable debt and upon attachment gives court in rem jurisdiction of defendant — Seider v. Roth (17 N Y 2d 111) controls.

The contractual rights of a nonresident insured defendant under a policy of liability insurance issued by an insurer doing business in New York constitute a "debt" owed to the nonresident insured defendant which is subject to attachment and when attached gives the court in rem jurisdiction over defendant. *Seider* v. *Roth* (17 N Y 2d 111) controls.

Simpson v. *Lochmann*, 28 A D 2d 518, affirmed.

APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered May 11, 1967, which unanimously affirmed an order of the Supreme Court at Special Term (IRVING L. LEVEY, J.), entered in New York County, denying a motion by defendant to vacate a warrant of attachment. The following question was certified: "Was the Order of Special Term, entered February 9, 1967, affirmed by the Order of this Court entered on the 11th day of May, 1967, properly made?" The Appellate Division stated that its determination was made as a matter of law and not in the exercise of discretion.

William F. McNulty and *Daniel J. Coughlin* for appellant. I. The attachment in New York of the inchoate and contingent contractual rights of defendant insured under the policy of liability insurance issued to him at his domicile in the State of Connecticut by Insurance Company of North America, a Pennsylvania insurance corporation licensed to do business in New York, is violative of basic constitutional principles of jurisdiction and clearly deprives the insured (as well as the insurer) of property without due process of law, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. (*Pearson* v. *McGraw*, 308 U. S. 313; *Sheehy* v. *Madison Sq. Garden Corp.*, 266 N. Y. 44; *Dutch-Amer. Mercantile Corp.* v. *Safticraft Corp.*, 17 A D 2d 421; *Seider* v. *Roth*, 17 N Y 2d 111; *Harris* v. *Balk*, 198 U. S. 215; *United States* v. *New York, N. H. & H. R. R. Co.*, 276 F. 2d 525; *Hanson* v. *Denckla*, 357 U. S. 235; *Milliken* v. *Meyer*, 311 U. S. 457; *Hess* v. *Pawloski*, 274 U. S. 352; *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306.) II. The attachment herein also imposes an unreasonable burden on interstate commerce, in violation of article I (§ 8, cl. 3) of the Constitution of the United States. (*United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U. S. 451.) III. CPLR 5201 and 6202, as construed by this court in *Seider* v. *Roth* (17 N Y 2d 111), clearly impair the obligations of the contract of liability insurance involved herein, in violation of article I (§ 10, cl. 1) of the Constitution of the United States. (*Columbia Gas & Elec. Co.* v. *South Carolina*, 261 U. S. 236; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *Hartford Acc. & Ind. Co.*

v. *Delta & Pine Land Co.*, 292 U. S. 143.) IV. In substance, the attachment herein is a "direct action" brought against the insurer, in violation of the due process clause of the Constitution of the United States. (*Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66.)

Paul A. Crouch and *Robert Hill Nix* for respondents. I. *Seider* v. *Roth* is in accordance with every reported case on the question. (*Seider* v. *Roth*, 17 N Y 2d 111; *Hartford Fire Ins. Co.* v. *Citizens' Bank of Booneville*, 166 Ark. 551; *Finch* v. *Great Amer. Ins. Co.*, 101 Conn. 332; *Parker, Peebles & Knox* v. *El Saieh*, 107 Conn. 545; *Lancashire Ins. Co.* v. *Corbetts*, 165 Ill. 592; *German Bank* v. *American Fire Ins. Co.*, 3 Iowa 491; *Neufelder* v. *German Amer. Ins. Co.*, 6 Wash. 336; *Ackerman* v. *Tobin*, 22 F. 2d 541, 276 U. S. 628; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *Rinchey* v. *Stryker*, 28 N. Y. 45.) II. Attachment requires only property or a creditor within the jurisdiction and some notice to defendant of the object of the suit. (*Pennoyer* v. *Neff*, 95 U. S. 714; *Matter of United States of Mexico* v. *Schmuck*, 294 N. Y. 265; *Cooper* v. *Reynolds*, 77 U. S. 308; *International Shoe Co.* v. *Washington*, 326 U. S. 310.) III. There is no impairment of the obligations of contract. IV. No burden on interstate commerce is involved. (*Williams* v. *Eggleston*, 170 U. S. 304; *Missouri, Kansas & Texas Ry. Co. of Texas* v. *Cade*, 233 U. S. 642; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; *Polish Nat. Alliance of U. S. of No. America* v. *National Labor Relations Bd.*, 322 U. S. 643; *The Winnebago*, 205 U. S. 354; *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 217 U. S. 157; *Sherlock* v. *Alling*, 93 U. S. 99; *California* v. *Thompson*, 313 U. S. 109; *Robertson* v. *California*, 328 U. S. 440; *International Milling Co.* v. *Columbia Transp. Co.*, 292 U. S. 511; *Morris Plan Ind. Bank of N. Y.* v. *Cumming*, 295 N. Y. 324; *Davis* v. *Farmers Co-op. Equity Co.*, 262 U. S. 312; *Michigan Cent. R. R. Co.* v. *Mix*, 278 U. S. 492; *Denver & Rio Grande Western R. R. Co.* v. *Terte*, 284 U. S. 284; *Hoffman* v. *Foraker*, 274 U. S. 21.) V. Describing this as a "direct action" case is an untenable objection. (*Chicago, Rock Is. & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710.)

Chief Judge FULD. On th[illegible]peal, the defendant asks us to reconsider our recent decis[illegible]n *Seider* v. *Roth* (17 N Y 2d

111) that the contractual rights of an insured under a policy of liability insurance constitute a "debt" which is subject to attachment.

On August 13, 1964, the infant plaintiff, a resident of New York, was injured when cut by the propeller of a boat owned by the defendant, a Connecticut resident, in the waters off Madison, Connecticut. The youngster and his father brought a negligence suit against the defendant in this State. Unable to obtain personal jurisdiction over the defendant in New York, the plaintiffs had the summons and complaint delivered to the defendant at his residence in Connecticut and attached a liability policy issued to the defendant in that State by the Insurance Company of North America, a Pennsylvania corporation doing business in New York and having an office in Manhattan.[1]

The defendant moved to vacate the attachment on jurisdictional and constitutional grounds. The court at Special Term denied the motion; the Appellate Division unanimously affirmed "on constraint of *Seider* v. *Roth*" (17 N Y 2d 111), and granted the defendant leave to appeal to us.

This court in 1966 held in the *Seider* case (17 N Y 2d 111, *supra*) that the contractual obligation of an insurance company to its insured under its liability insurance policy constitutes a "debt" under CPLR 5201 and, as such, is subject to attachment, at the suit of an injured third party, under CPLR 6202. As noted above, the defendant upon this appeal asks us to reconsider and overrule our decision in *Seider* in the light of Federal constitutional issues not raised in that case. The constitutional contentions now urged are that the attachment made pursuant to the provisions of the CPLR as construed (1) offends against due process; (2) imposes an undue burden on interstate commerce in the field of insurance; and (3) impairs the obligations of the contract of liability insurance herein.

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1. An ex parte order of attachment was entered at Special Term directing the Sheriff of the City of New York to levy on any property of the defendant within his jurisdiction sufficient to satisfy the demands of the plaintiff, and the Sheriff thereafter attached the "rights" of the defendant under a policy of liability insurance issued by North America.

Neither of the last two constitutional arguments has, in our judgment, anything to do with the case,[2] although it does have due process overtones. No claim is advanced, and obviously none may be made, that the defendant did not have notice of the attachment. (See, e.g., *Harris* v. *Balk*, 198 U. S. 215, 227; *Holmes* v. *Camp*, 219 N. Y. 359, 369.) Our decision turns, then, on whether the obligation of the insurer — doing business in New York — to defend and indemnify the insured (under its policy) enables the New York courts to exercise jurisdiction in rem over him.

In reaching its conclusion in *Seider*, the court relied on its decision in *Matter of Riggle* (11 N Y 2d 73), characterizing it as a "pertinent decision which cannot be distinguished away" (17 N Y 2d, at p. 113). The *Riggle* case involved the continuance of a negligence action in New York following the death of the defendant Riggle who was a nonresident. To obtain such a continuance, it was necessary to have an ancillary administrator appointed and served in New York, and that could only be done, pursuant to the Surrogate's Court Act (§ 45, subd. 3), if Riggle left real or personal property in New York State. The court, after noting that the only property claimed to have been left by Riggle in New York was "the personal obligation of an indemnity insurance carrier to defend him as an additional insured under a liability policy", went on to hold that "this liability insurance policy, even though no judgment has yet been obtained against Riggle or his estate, constituted Riggle as a creditor and the insurance carrier as a debtor within the broad meaning of [Surrogate's Ct. Act, § 47] for this purpose" (11 N Y 2d, at p. 76).

In the course of his opinion in *Seider* (17 N Y 2d 111, *supra*), Chief Judge DESMOND, who wrote for the court, quoted from

2. The defendant lacks standing to raise the "interstate commerce" argument but, even assuming he may, it is answered sufficiently in *Morris Plan Ind. Bank of N. Y.* v. *Gunning* (295 N. Y. 324), in which we declared (p. 332) that the inconvenience caused by the attachment of a nonresident's wages, earned out of state from a railroad doing business in New York, "does not constitute an unconstitutional burden on commerce (*Davis* v. *C.C.C. & St. L. Ry.*, 217 U. S. 157). Nor is there any merit to the defendant's argument — which was not raised below — that the attachment impairs contract obligations by "literally inviting the insured to withhold • • • co-operation". If the insured does refuse to co-operate, the insurer's recourse is clear: he may withdraw and assert such lack of co-operation as a defense in any action brought against him under section 167 of the Insurance Law.

that excerpt and then stated (p. 114): "It is interesting to note that the dissenting Judge in *Matter of Riggle* conceded that the insurance company's obligation 'to defend and contingently indemnify' was a debt, but he was of the opinion, contrary to that of the majority, that the insurer was not a resident of the State within the meaning of section 47. The reasoning of the *Riggle* case is sound and calls for an affirmance here. Decisions just like *Riggle*, some of them quite old, are found in other States [cases cited]." And Judge DESMOND added (pp. 114–115): "Not only has the law question in this case been decided by *Riggle* but there is no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont injuring New York residents, any more than there was in *Oltarsh* v. *Aetna Ins. Co.* (15 N Y 2d 111) where for the first time we held that when New York residents were injured outside the State we would allow a direct action in New York against the insurer although there was nothing in previous New York law permitting it."

As demonstrated by a reading of the majority and dissenting opinions in the *Seider* case, the question whether the insurer's obligation constitutes a debt owing to the insured defendant and, as such, is subject to attachment under the CPLR was thoroughly debated and considered. It was our opinion when we decided that case, and it still is, that jurisdiction was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. And we perceive no denial of due process since the presence of that debt in this State (see, e.g., *Harris* v. *Balk*, 198 U. S. 215, *supra*)—contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him. It is, of course, hardly necessary to add that neither the *Seider* decision nor the present one purports to expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached, that is, the liability insurance policy. For the purpose of pending litigation, which looks to an ultimate judgment and recovery, such value is its face amount and not some abstract or hypothetical value.

Appendix "A"

Opinion per Chief Judge FULD

The argument that our decision sanctions a "direct action" against the insurer is sufficiently answered by what we wrote in *Seider* v. *Roth* (17 N Y 2d, at p. 114):

> "It is said that by affirmance here we would be setting up a 'direct action' against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured."

In concluding that we should adhere to *Seider* v. *Roth*, it may prove helpful to have in mind some of the considerations upon which that decision was predicated.

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, e.g., *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N Y 2d 443.) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. (See, e.g., *Thrasher* v. *United States Liab. Ins. Co.*, 19 N Y 2d 159, 167.) Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, it has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.

The position taken by some who disagree with *Seider* would require that, as a matter of State policy, insurance be explicitly eliminated as the basis for the exercise of our in rem jurisdiction but this represents a judgment requiring data and information

with respect to the practical effect of the *Seider* decision not presently available to this court.

Almost half a century ago, Chief Judge CARDOZO began his famous article, "A Ministry of Justice" (35 Harv. L. Rev. 113), with the statement that "The courts are not helped as they could and ought to be in the adaptation of law to justice". Some time thereafter, the New York Legislature created a Law Revision Commission and, more recently, the State's Judicial Conference appointed an Advisory Commission on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the bases for in personam jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of in rem jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances, it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of in rem jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship *inter se*, of in rem jurisdiction, in personam jurisdiction and *forum non conveniens*. Absent new data suggesting the desirability of a departure from the general principles underlying in rem jurisdiction, as reflected in *Seider*, we find neither basis nor justification for departing from our holding in that case.

The order appealed from should be affirmed, with costs, and the certified question answered in the affirmative.

KEATING, J. (concurring). An automobile liability insurance company subjects itself to the laws of any jurisdiction through which the insured passes and becomes involved in an accident. Louisiana, for example, has a direct action statute. Thus, although the insurance policy was issued to the insured in Connecticut, there is little question that, if the accident had taken place in Louisiana, the insurance company could be called upon to defend the action as a party defendant in that State, provided that jurisdiction could be obtained. (*Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66.) And if the party injured

in a Louisiana accident was a New York resident and jurisdiction over the insurer could be had in this State, we would permit a direct action to be commenced here. (*Oltarsh* v. *Aetna Ins. Co.*, 15 N Y 2d 111.)

The constitutional justification for subjecting the insurer to such liability arises not per se because the accident took place in Louisiana but because the occurrence of the accident gave rise to a legitimate governmental interest which Louisiana has in protecting the rights of those persons injured within its borders. As the Supreme Court wrote in *Watson* v. *Employers Liab. Assur. Corp.* (*supra*, p. 72): "Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call on friends, relatives or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for the recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment". (See, also, *Clay* v. *Sun Ins. Office*, 377 U. S. 179; Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, The Supreme Court Review, 1964, pp. 89–103.)

Similar State interests, it seems to me, would sustain a direct action against the insurer in this jurisdiction if the Legislature had authorized such actions, even though the action could not have been brought directly in the State in which the accident took place. Although no direct action statute is presently in effect, I see no policy reason for not holding that service of process on the real party defendant — the insurer — is sufficient to compel it to defend in this State, provided it transacts business here and is thus subject to the jurisdiction of our courts.

This court has on a number of occasions given effect to the strong State interest in facilitating recovery of persons injured in automobile accidents. The fact that the injury occurs outside of this State does not, of course, lessen that interest. (*Babcock* v. *Jackson*, 12 N Y 2d 473; *Macey* v. *Rozbicki*, 18 N Y 2d 289, 292, [concurring opn.].)

Likewise, we have on a number of occasions recognized that the real party in interest is the insurer and we have given effect to the fiction sought to be perpetuated here only where the

insurer would be prejudiced thereby. As we recently stated: "The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action [only] in order to protect the insurance company against overly sympathetic juries". (*Thrasher* v. *United States Liab. Ins. Co.*, 19 N Y 2d 159, 167.) It rejects the fiction when the policy considerations are not present. (See *Oltarsh* v. *Aetna Ins. Co.*, 15 N Y 2d 111, *supra*; *Macey* v. *Rozbicki*, 18 N Y 2d 289, 292, *supra* [concurring opn.]; *Thrasher* v. *United States Liab. Ins. Co.*, *supra*.)".

The decision in *Seider* v. *Roth* (17 N Y 2d 111) and the cases we decide today represent a recognition of realities and not fictions. It is for this reason that I concur in the result reached.

BREITEL, J. (concurring). I concur but only on constraint of *Seider* v. *Roth* (17 N Y 2d 111) so recently decided by this court. Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.

The applicable statutes are CPLR 5201 (subd. [a]) and 6202. They read as follows:

"(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201, subd. [a])

and

"Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be

enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'" (6202).

True, these contemporary statutes are designed to reach every kind of marketable and assignable property, and every kind of right that is reducible to marketable or assignable economic value. They refer to debts and property, and in the case of causes of action they must be assignable. But they are not intended or designed to reach every obligation created by contract, however inchoate, conditional, contingent, or personal. The obligation to defend and, even more, the obligation to indemnify are just such inchoate, conditional, contingent, and personal obligations. Before they come into play, there must be an external event (usually an accident) within the coverage of the policy, performance of conditions precedent by the insured, and co-operation by the insured. Even then, if the insurer's obligation to defend is fully performed, there is nothing of economic value to which the insured may make claim, receive, or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.

The statutes, in making intangible assets leviable and attachable, are not intended to reach the intangible right as such but instead to reach the tangibles that eventually must result from the intangible right. Thus, at the very least, before any intangible right has practical significance as an asset to be levied upon or attached, it must give promise of being translatable into an economically valuable tangible, usually cash. The instances are easiest for application of the statutes when, unlike here, the intangible right is marketable or assignable. Hence, the inappropriateness of precedents based upon life insurance policies (matured or unmatured), upon property or fidelity loss policies after loss, and the like. In each of such instances the insured's right to tangible funds has attained a cognizable probability of being translated into funds.

So much for the analysis of the rights involved, no merely theoretical matter, but one which goes to the usefulness of the

legal concepts employed, which must have some root in reality. As for the effect of the rule, the practical consequences are highly undesirable. This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases (see, e.g., *Gilchrist* v. *Trans-Canada Air Lines*, 27 A D 2d 524). On the basis of the rule in the *Seider* case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State.

Finally, it is hardly necessary to analyze further the vulnerability of the rule, since that task was accomplished so well by the dissent of Judge BURKE in the *Seider* case. But the temptation is great to repeat Judge BURKE's exposure of the fallacy underlying the rule, namely, "The existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue" (17 N Y 2d 111, 115, *supra*).

Adverse and strident criticism by disinterested commentators on the rule is not without significance (e.g., Prof. David D. Siegel, Supplementary Commentaries to CPLR 5201; McKinney's Cons. Laws of N. Y., Book 7B [1967 Cum. Sup.], pp. 13–21, 23–31; Comment, "Garnishment of Intangibles," 67 Col. L. Rev. 550 [1967]; 71 Dick. L. Rev. 653 [1967]).

I do not reach the constitutional issues raised. If the court was right in the *Seider* case, then there is no constitutional question. If it was wrong, there still might be no constitutional question. But it could not have decided the substantive question without assuming a reality in the "obligation" being attached that would satisfy constitutional standards.

Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed.

BURKE, J. (dissenting). In my dissent in *Seider* v. *Roth* (17 N Y 2d 111) I indicated why in my view there was not in that case even an attachable debt which could serve as a basis for the exercise of jurisdiction under our practice statutes. The

constitutional arguments raised in this case, as well as in *Victor* v. *Lyon Assoc.* decided herewith (21 N Y 2d 695), were not raised in *Seider* and thus it was not necessary to reach these so difficult issues in that case. In considering now the constitutionality of our claim of jurisdiction to affect the rights and interests of parties involved in *Seider*-type controversies, I am moved to confess agreement with the comment of Professor Siegel: "Whatever problems one can conjure up in connection with [*Seider*] prove incomplete; more appear, and each partakes of the same theoretical and practical difficulties. These problems often prove so bizzare that they become difficult even to verbalize." (Professor D. D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B [1967 Cum. Sup.], p. 16.) *Seider* cannot be fitted into the traditional modes of analysis ordinarily useful in considering jurisdiction, except with great difficulty, and even applying the more recently devised (progressive, if you will) approach to jurisdiction wherein the distinction between in rem and in personam jurisdiction is de-emphasized (see, e.g., *Atkinson* v. *Superior Ct.*, 49 Cal. 2d 338, apps. dsmd. and cert. den. *sub nom. Columbia Broadcasting System* v. *Atkinson*, 357 U. S. 569), *Seider* presents substantial problems. I am, however, constrained to conclude that under none of these approaches can *Seider* be upheld as constitutional.[1]

Considered as but the creation of a "direct action" remedy, arrived at by way of judicial decision, rather than through the more normal fashion of legislation, and, therefore, based, in reality, if not in form, solely upon in personam jurisdiction over the insurer rather than on the existence of "property" belonging to the ostensible defendant-insured within this State, *Seider* is of doubtful constitutionality. Granted jurisdiction over the insurer, this State's interference with or alteration of the rights and obligations of parties to a contract of insurance issued out of State violates due process, it seems clear under *Watson* v.

1. It ought to be noted that under *New York Life Ins. Co.* v. *Dunlevy* (241 U. S. 518), an action at least initially in rem in character, as it was commenced by means of a garnishment of the insurer's obligation to pay the value of the policy, *Seider* might well be held unconstitutional. (See Siegel, *op. cit.*, pp. 19-20.) I must be frank, however, to admit my uncertainty as to whether the result obtained there ought to control here. Developments in the area of jurisdiction have come a long way since 1916 when *Dunlevy* was decided.

Employers Liab. Assur. Corp. (348 U. S. 66), unless we can show a sufficient State interest in the insurance relationship or in the underlying accident to justify such interference. (This point is discussed with particular acuity in an excellent student comment on *Seider*, "Garnishment of Intangibles," 67 Col. L. Rev. 550, 558–560.) Mere presence of the insurer in this State, which is all that *Seider* appears to require, based as it is on a highly formalistic in rem attachment approach, would not seem sufficient to establish such an interest,[2] and even if *Seider* is to be read as requiring that the plaintiff must have been a New York resident at the time of the accident,[3] these would not seem sufficient additional circumstances to warrant interference with the rights and obligations of the parties to the out-of-State contract. In *Watson* the Supreme Court was at pains to stress the significance of the occurrence of the injury in the forum State. The court remarked: "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. *Persons injured or killed in Louisiana* are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. * * * Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. * * *. If this motion [to dismiss] is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and *her claim is for injuries from a product bought and used there*" (*supra*, pp. 72–73; emphasis added).

Seider may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, *Seider* would seem to allow) an umbrella of protection

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2. Illustrative of the type of case *Seider* would appear to invite into our courts is the *Vaage* case (see *Nationwide Ins. Co.* v. *Vaage*, 265 F. Supp. 556 [S. D. N. Y., 1967]). Vaage, a citizen and resident of Norway, has commenced, by means of a *Seider*-type attachment, an action in New York based upon an automobile accident in which he was involved in North Carolina. Defendant is a North Carolina resident and the liability policy was issued there. What purpose allowing suit to be brought here, other than possibly increasing Vaage's hoped for damage award, is beyond me.

3. This might pose a problem under the Federal Constitution if *Seider's* in rem basis were carried to its logical extreme. See *Harris* v. *Balk* (198 U. S. 215, 223–224).

including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent,[4] only if we may say to such persons that no matter which State or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character. I do not read *Watson* as allowing this and, in fact, *Home Ins. Co.* v. *Dick* (281 U. S. 397) may be read as barring such an extension of the regulatory power of this State beyond its territorial limits. In *Dick*, the Supreme Court, in language particularly apt for the *Seider* situation, pointed out that residence was not enough to create such jurisdiction. It there remarked: "The fact that Dick's permanent residence was in Texas is without significance. *At all times here material*, he was physically present and acting in Mexico" (*supra*, p. 408; emphasis added; cf. *Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S. 179, 182). Likewise, at all times that I would consider material, to wit, when the accidents occurred, *Seider* and the plaintiffs in the cases now before this court, *Simpson* and *Victor*, were "physically present and acting" outside this State.

Watson is in many ways analagous to developments that have taken place in the extension of State court jurisdiction under the various State "long-arm" statutes. In fact, many would urge that on the facts of that case Louisiana might have constitutionally exercised in personam jurisdiction over the out-of-State manufacturer (compare *Gray* v. *American Radiator & Std. Sanitary Corp.*, 22 Ill. 2d 432; compare, also, *Feathers* v. *McLucas*, 15 N Y 2d 443, 458-464, with the subsequent amendment to CPLR 302 added by L. 1966, ch. 590). Under the facts of *Seider* and the cases now before us I know of no authority that would support in personam jurisdiction in the courts of this State over the out-of-State defendant-insured.

The very same considerations lead me to doubt that jurisdiction in rem based upon the obligations of an insurer under a contract of insurance can constitutionally be exercised by this State in the *Seider* situation. Assuming even the continued

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4. For example, in *Victor* v. *Lyon Assoc.* (21 N Y 2d 695) plaintiff was injured in Danang, South Vietnam. Defendant is a Maryland corporation doing business in the Far East and the policy was issued in Okinawa. Coverage was limited to certain areas in the Far East.

utility and constitutional viability of the rule of *Harris* v. *Balk* (198 U. S. 215) that a debt has its *situs* and may be attached in any State in which the debtor is subject to in personam jurisdiction, it is clear that the obligations of an insurer under a liability policy to defend and indemnify the insured are not "ordnary debts," such as the Supreme Court was considering in *Harris* v. *Balk* (see 198 U. S., p. 223). They are contingent contractual obligations, requiring the commencement of suit against the insured (and the obtaining of a judgment with respect to the obligation to indemnify) before the insured has any claim against the ostensible "debtor" insurer. The defendant-insured has no property within the State, which is the necessary predicate for an exercise of in rem jurisdiction (*Hanson* v. *Denckla*, 357 U. S. 235, 246), unless New York may properly (i.e., constitutionally) transform these contingent obligations into matured debts owing to the insured. This it cannot do absent a sufficient State interest in the insurance relationship or the accident. In my dissent in *Seider* I referred to the result obtained there as jurisdiction acquired through a "bootstrap operation" (17 N Y 2d 111, 115, quoting Professor Siegel). This sort of bootstrap operation, I respectfully submit, is constitutionally impermissible under the circumstances presented in *Seider* and the cases now before this court.

Going further, it may well be argued that, even if these intangible interests could be considered fully matured and owing to the insured even before the commencement of an action in personam, strong arguments exist for the proposition that due process bars assigning such intangibles a situs, for attachment purposes, in New York. As mentioned above, *Harris* v. *Balk* (*supra*) speaks only of "ordinary debts" and *Hanson* v. *Denckla* (*supra*) may fairly be read as leaving open the question of situs for jurisdictional purposes of less simple intangibles, if not even as seriously undercutting *Harris* v. *Balk* altogether. The court in *Hanson* v. *Denckla* in discussing in rem jurisdiction pointed out that, while tangible property posed no problem for application of the rule that the property had to be within the territorial jurisdiction of the forum State for an exercise of such jurisdiction to be proper, the situs of intangibles posed quite a different problem. (See 357 U. S. 235, 246-247, *supra*.) The court expressly declined to

decide whether the type of jurisdiction there dealt with could be exercised by more than one State (which it was at liberty to do as the parties apparently assumed the trust assets were located exclulsively in Delaware). (*Ibid.*) The Supreme Court is, it seems clear, peculiarly aware of developments in this area of the law (see *Texas* v. *New Jersey*, 379 U. S. 674, 678) and it might well be prepared to accept the view of the authors of a recently proposed revision of the Restatement of Conflicts that State courts ought not to exercise jurisdiction over "interests in an intangible thing which is not embodied in a document" unless "the relationship of the state to the thing and to the parties involved makes the exercise of such jurisdiction reasonable." (See Proposed Official Draft, Restatement, Conflict of Laws, 2d, Pt. I. May 2, 1967, § 65.) This would bring the test for in rem jurisdiction over intangibles having a possible situs in a number of States quite close to that obtaining for in personam jurisdiction. It might even be suggested that such property ought to be assigned a situs in a particular jurisdiction for in rem jurisdiction purposes only where the jurisdiction has some "minimum connection" with the property and "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co.* v. *Washington*, 326 U. S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222; cf. *Atkinson* v. *Superior Ct., supra.*) The assigning of situs to intangibles is, as we all know, but a legal fiction (see *Hanson* v. *Denckla, supra*, p. 247; see, also, *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co.*, 255 N. Y. 120, 123; *Bankers Trust Co.* v. *Equitable Life Assur. Soc.*, 19 N Y 2d 552, 556) and while justice or convenience may on occasion require such an assignment of situs to intangibles, considerations of the purpose for which such an assignment of situs is necessary and fairness to those claiming an interest in the subject property ought to govern the selection process. (Cf. *Bankers Trust Co.* v. *Equitable Life Assur. Soc., supra*; see, also, *Texas* v. *New Jersey, supra.*)

As the foregoing analysis makes clear, *Matter of Riggle* (11 N Y 2d 73) in no way required the result reached in *Seider*. In *Riggle* the plaintiff had, in fact, secured in personam jurisdiction over Riggle before his death. All that was sought to be

achieved there was a means of continuing the action against his estate. In terms of current jurisdictional notions this result was perfectly fair and proper. (Cf. *Rosenfeld* v. *Hotel Corp of America*, 20 N Y 2d 25.) What was done in *Riggle* should not, simply because of the form our action there took, be held to dictate the result reached in *Seider*. The circumstances of the two cases are entirely different.

I would reverse the order of the Appellate Division in this case, as well as in *Victor* v. *Lyon Assoc.*, and remand the cases to the Supreme Court with directions that the motions to vacate these attachments be granted.

Opinion by Chief Judge FULD. All concur, Judge KEATING in an opinion and Judge BREITEL in a separate opinion in which Judge BERGAN concurs, except Judge BURKE who dissents and votes to reverse in an opinion in which Judge SCILEPPI concurs.

Order affirmed, etc.

APPENDIX "B"

Order dated December 8, 1966

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof located at 60 Centre Street, New York, New York on the 8th day of December, 1966.

PRESENT:

HON. THOMAS C. CHIMERA,

Justice.

[SAME TITLE]

A motion having been made by the garnishees herein, American International Underwriters Corp. and The Hanover Insurance Company of New York, for an order vacating the plaintiff's order of attachment and levy thereunder and a cross motion having been made by the plaintiff for an order pursuant to Section 6214(e) of the Civil Practice Law and Rules extending the plaintiff's time to perfect the levy herein until the expiration of 90 days after the garnishees' motion is decided,

Now, upon reading and filing the order to show cause dated September 29, 1966, the affidavit of Peter J. Malloy, Jr., duly sworn to the 29th day of September, 1966, the affidavit of Pat Magarick, duly sworn to the 28th day of September, 1966, the order of attachment of property of the defendants granted on the 23rd day of August, 1966 and exhibits all in support of the garnishees' motion to vacate the order of attachment and levy thereunder and the affidavit of Peter J. Malloy, Jr., duly sworn to the 24th day of October, 1966 in opposition to the plaintiff's cross motion, and upon the plaintiff's notice of

Appendix "B"

Order Appealed From dated December 8, 1966

cross motion dated October 21, 1966 and the affidavit of Herman Schmertz duly sworn to the 21st day of October, 1966 in support of the plaintiff's cross motion and upon said affidavit of Herman Schmertz duly sworn to the 21st day of October, 1966 and the affidavit of Carl S. Victor duly sworn to the 3rd day of October, 1966 in opposition to the granting of the garnishees' motion and the motion having duly come on to be heard on the 25th day of October, 1966, and counsel having submitted their papers, and upon reading and filing the decision of the Court,

Now, on motion of GAIR AND GAIR, attorneys for the plaintiff, Carl S. Victor, it is

ORDERED, that the motion to vacate the order of attachment and levy thereunder as to the American International Underwriters Corp. is granted and it is further

ORDERED, that the motion in all other respects is denied, and it is further

ORDERED, that the plaintiff's cross motion for an extension of the plaintiff's time to perfect the levy herein is granted, and it is further

ORDERED, that the plaintiff's time to perfect the levy herein is extended to 90 days from the service of a copy of this order with notice of entry..

ENTER:

THOMAS C. CHIMERA
J.S.C.

FILED
DEC. 9, 1966
CO. CLERK'S OFFICE
NEW YORK

APPENDIX "C"

Opinion of Croake, D.J.

(Podolsky v. Devinney)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67-Civ. 3150

BETTY PODOLSKY,

Plaintiff,

—v—

ETHEL M. DEVINNEY and GARRY A. DEVINNEY,

Defendants.

Appearances:

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By: Myron Nadler, Esq.
Of Counsel

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By: Charles G. Pillon, Esq.
Of Counsel

CROAKE, D. J.

Appendix "C"

Opinion of Croake, D.J. (Podolsky v. *Devinney)*

OPINION

The present motion, seeking vacation of an order of attachment, challenges the constitutionality of the recent decision by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966).[1] In that case the Court of Appeals decided that an automobile liability insurance policy held with an insurance company doing business in New York becomes an attachable debt within the meaning of §§ 5201 and 6202 N.Y.C.P.L.R.[2] upon the occurrence of an automobile accident.[3] The defendants, through attorneys secured by their insurer, General Accident Fire & Life Assurance Corporation, Ltd. (GENERAL ACCIDENT)[4]

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[1] The constitutionality of the rule laid down in *Seider* v. *Roth* has been upheld by the New York Court of Appeals in a sharply divided opinion. *Simpson* v. *Lochman*, N. Y. 2d (December 29, 1967), 36 U.S.L. Week 2443 (January 30, 1968), discussed at pp. 6-8, *infra*.

[2] Section 5201 in pertinent part provides:

"(a) *Debt against which a money judgment may be enforced.*

A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

"(b) *Property against which a money judgment may be enforced.*

A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. . . ." See also § 6202 N.Y.C.P.L.R. providing that debts described in § 5201 are subject to attachment.

[3] See *Seider* v. *Roth*, 17 N.Y. 2d 111, 113, 269 N.Y.S. 2d 99, 101 (1966).

[4] GENERAL ACCIDENT is a corporation organized and existing under the laws of Great Britain and is authorized to do business in New York, New Jersey, and several of the other states in the United States. (See Pillon Affidavit in support of the present motion.)

charge that New York lacks the requisite minimum contacts necessary to subject the insurance policy to levy and therefore assertion of jurisdiction by New York State violates the due process clause of the 14th amendment of the United States Constitution. The motion papers on behalf of the insurer as garnishee also contend that because a limited appearance is not permitted under the New York law the named defendants, by failing to authorize an appearance of the insurance company on their behalf, may subject the insurer to a default judgment up to the policy limits without ever allowing the company to defend the action on its merits.[5] GENERAL ACCIDENT argues that such a result would deprive it of its property without due process of law. Implicit in both of these objections to jurisdiction is the contention that New York in effect has established a direct action without sufficient minimum contacts or without adequate procedural safeguards.

The present controversy is a product of an accident occurring on or about May 8, 1966. The plaintiff, a New York resident, alleges in her complaint that while crossing Saddle River Road at the intersection with Rys Place in Fairlawn, New Jersey, she was struck by an automobile owned by Ethel M. Devinney and being operated at the time by her son, Garry A. Devinney. The Devinneys are residents of New Jersey. As a result of the accident plaintiff Podolsky suffered serious injuries requiring hospitalization in Fairlawn Memorial Hospital in Fairlawn, New Jersey, from the date of the accident through June 10th of that year. Damages sought in the complaint total $75,000.

On July 21, 1967, the present action was commenced against the petitioners in the Supreme Court of the State of New York in Bronx County by service of a summons and complaint. Theretofore, on July 14, 1967, an order of

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[5] See § 320 N.Y.C.P.L.R. and § 167 N.Y. Insurance Law discussed at pp. 11-12, 17-18, 20, *infra*.

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attachment had issued from the above court directing the Sheriff to levy on the property of the defendants. Pursuant to this order the Sheriff attached Ethel M. Devinney's interest in automobile liability policy No. ACF 97-813-32 by delivering a copy of the order to GENERAL ACCIDENT at its offices at 110 William Street in New York City. As this action could have been brought here in the first instance under 28 U.S.C. § 1332 (1964), the defendants chose to remove to this court under 28 U.S.C. § 1441 (1964).[6] The removal was accomplished on August 17 and papers noticing this motion were promptly filed with the clerk of the court on September 12, 1967.

At the outset it should be noted that in a case where jurisdiction is based on diversity of citizenship this court normally is bound to follow the decisions of the court of

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[6] Rule 4(e), Fed. R. Civ. P., provides in pertinent part:

"*Same: Service Upon Party Not Inhabitant Of Or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of an notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides . . . . (2) for service upon or notice to him to appear and respond or defend in an action by reason of an attachment or garnishment or similar seizure of his property located within the state, service may be made under the circumstances and in the manner prescribed in the statute or rule."

Prior to the adoption in 1963 of Rule 4(e)(2) it was questionable whether this action could have been initiated in this court. Some federal courts had held that attachment and garnishment were not available until jurisdiction over the person of the defendant had been obtained by service of process. See, e.g., *Davis* v. *Ensign-Bickford Co.*, 139 F. 2d 624 (8th Cir. 1944). See generally *Carrington, The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303, 305 (1962). However, it was always clear that the present action could be removed to this court. See *Davis* v. *Ensign-Bickford Co., supra; Hotcher* v. *Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267 (8th Cir. 1904).

last resort in New York. *Guaranty Trust Co.* v. *York*, 325 U.S. 99 (1945); *Erie* v. *Tompkins*, 304 U.S. 64 (1938). The District Court must apply the law enunciated by the highest state court even if it believes a given case was wrongly decided. *Universal Underwriters Ins. Co.* v. *Wagner*, 367 F. 2d 866 (8th Cir. 1966); *Klages* v. *Cohen*, 146 F. 2d 641 (2d Cir. 1945); *Paschall* v. *Mooney*, 110 F. Supp. 749 (S.D. N.Y. 1953). However, even in diversity cases, when the decision of the state court is challenged on constitutional grounds, this court must be guided by the decisions of the Supreme Court and appellate courts of the United States rather than the state courts. See *Gilmore* v. *Greene County Democratic Party Exec. Comm.*, 370 F. 2d 919, 920 (5th Cir. 1966); *Aftenase* v. *Economy Baler Co.*, 343 F. 2d 187 (8th Cir. 1965); *Ark-La Feed & Fertilizer Co.* v. *Marco Chemical Co.*, 292 F. 2d 197 (8th Cir. 1961); *Belanger* v. *Great American Indemnity Co. of N.Y.*, 89 F. Supp. 736, 738 (D.C.La. 1950). Therefore, while the rationale of the New York Court of Appeals in *Seider* v. *Roth, supra,* deserves our careful consideration, this court is not necessarily bound by that determination. See, e.g., *Smayda* v. *United States*, 352 F. 2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

The serious constitutional questions presented in this case have been the subject of several prior determinations in both federal and state courts in New York. In *Nationwide Mutual Ins. Co.* v. *Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967), a three judge court was convened to consider the constitutionality of the attachment procedure approved in *Seider* v. *Roth*. While the three judge court dissolved itself on the ground that under 28 U.S.C. § 2283 (1964), it lacked the power to enjoin the pending state court actions, Judge Tyler writing for the panel also observed that the insurance companies had ". . . yet to fully and fairly present their constitutional arguments to the New York courts at

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any level." *Id.* at 562. Under these circumstances the court believed that the companies had not shown the existing state actions could not be prosecuted with full protection of the petitioners' constitutional contentions. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420 (1964); *Government & Civil Employees Organizing Comm., CIO* v. *Windsor*, 353 U.S. 364 (1957); *Railroad Comm. of Texas* v. *Pullman Co.*, 312 U.S. 496, 501 (1941).

Any reasons for abstention by the federal courts, however, have now been removed, for the New York Court of Appeals has upheld the constitutionality of *Seider* in *Simpson* v. *Loehmann*, __ N.Y. 2d __ (December 29, 1967); 36 USL Week 2443 (January 30, 1968). In *Simpson* an infant plaintiff was injured when cut by the propeller of a boat owned by a Connecticut resident in the waters off Madison, Connecticut. Being unable to obtain in personam jurisdiction over the defendant in New York (see § 302 N.Y.C.P.L.R.), an action was commenced by personal service on the defendant in Connecticut and attachment of an insurance policy issued to the defendant by an insurance company doing business in New York. The defendant moved to vacate the attachment on jurisdictional and constitutional grounds. The Court of Appeals upheld the attachment procedure in a sharply divided opinion.[7] The opinion of the

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[7] The Court of Appeals split on several issues present in *Simpson* v. *Loehmann*, __ N.Y. 2d __ (December 29, 1967), 36 U.S.L. Week 2443 (January 30, 1968). Chief Judge Fuld (with whom Judge Van Voorhis concurred) and Judge Keating upheld the constitutionality of the rule in *Seider* on different theories and in separate opinions which are discussed in the text at pp. 7-8, *infra*. Judge Burke wrote a dissenting opinion in which Judge Scileppi concurred.

Judges Breitel and Bergan avowedly did not reach the question of *Seider's* constitutionality. They voted to affirm the rule on institutional considerations, feeling that judicial consistence on these attachments was more important that the correctness of the attachment procedure itself. In the main, however, their opinion was a

court was written by Chief Judge Fuld and followed what may be characterized as the traditional approach to the question of jurisdiction. The opinion in simplest terms stated that the insurance policy could fairly be characterized as a debt. The requisites necessary for *in rem* or *quasi in rem* jurisdiction are the presence of the *res* within the state, effective seizure, and adequate notice to its owner.[8] Judge Fuld found these requisites present in *Simpson* for there was personal service upon the owner of the debt and under the rule in *Harris* v. *Balk*, 198 U.S. 215, 227 (1905), the situs of a debt follows the debtor and is subject to garnishment wherever the debtor may be found. As the insurance company was doing business in New York the situs of the debt was New York.[9]

Judge Keating concurring in the opinion of the court expanded upon the theme, also expressed by Judge Fuld, that the procedure sanctioned in *Seider* v. *Roth* can be sustained on the ground that the State of New York has a sufficient

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strong dissent against the denomination of an insurance policy as a debt. Indeed, at one point Judge Breitel observed that "the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation." *Id.* at , 36 U. S. L. Week at 2444.

[8] *Harris* v. *Balk*, 198 U.S. 215, 227 (1905); *Pennoyer* v. *Neff*, 95 U.S. 714, 722-23 (1878).

[9] Chief Judge Fuld did not wrestle with the problem that under his analysis the situs of this *res* is not only New York but every state where the particular insurance company involved is doing business. While in this case no problem of conflicting jurisdiction is presented, it is not difficult to develop a fact situation where a serious problem could arise. Such would be the case were other states to engraft a *Seider* type procedure onto their attachment statutes and were an accident to occur involving plaintiffs who were citizens of New York and one of these jurisdictions. Would not then the debt be situated in both states at the same time? This is one of the things that distinguishes the present procedure from that sanctioned by *Harris* v. *Balk* where, although the situs of the debt is changeable, there can never exist more than one situs at any given point in time.

governmental interest in accidents involving New York plaintiffs to legislate a direct action statute. In Judge Keating's view the procedure in *Seider* v. *Roth* accomplishes this result by compelling the insurer, the real party defendant, to defend in this state provided it transacts business here and is thus subject to the jurisdiction of the New York courts. See *Simpson* v. *Loehmann,* N. Y. 2d at (December 29, 1967); 36 U.S.L. Week 2444 (January 30, 1968).

Both of these views must be carefully considered with the caveat that this court should not decide that the New York attachment procedure used in the present case is unconstitutional unless such an adjudication is unavoidable. See *United States* v. *Chibbaro,* 361 F.2d 365 (3rd Cir. 1966); *Kelly* v. *Illinois Bell Tel. Co.,* 325 F. 2d 148 (7th Cir. 1963).[10]

The concept of *quasi in rem* jurisdiction is based on the physical power of the state with regard to the *res* or thing attached. See *McDonald* v. *Mabee,* 243 U. S. 90, 91 (1917); *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). As such it must be

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[10] It might be noted parenthetically that the lower federal courts have more than a passing interest in the attachment procedure sanctioned in *Seider* v. *Roth.* The state courts are admittedly unable to obtain in personam jurisdiction over the defendants now brought before them under the *Seider* procedure. As undoubtedly there exists diversity of citizenship in all cases pursued under the *Seider* procedure, removal will be sought in many of the cases where the jurisdictional amount necessary for federal adjudication is present. This opens up a whole new area of diversity jurisdiction under Rule 4(e) and the federal courts will be administering a state rule of questionable constitutionality. The present question then is of importance to the entire federal court system whose diversity jurisdiction Congress has consistently sought to limit. See, e.g., 28 U.S.C. § 1332(a) (1964), (amended in 1958 substituting $10,000 for $3,000); 28 U.S.C. § 1332(c) (1964) (adding in 1964 a proviso deeming an insurer of liability insurance, in an action in which the insurer is not joined as a party-defendant, a citizen of the state of which the insured is a citizen, as well as the states where the insurer has been incorporated and has its principal place of business).

recognized that the authority of any tribunal is necessarily restricted by the territorial limits of the State in which it is functioning. See, e.g., *Hanson* v. *Denckla*, 357 U. S. 235, 246 (1958). While tangible property rarely poses any difficulty in determining the situs of the *res*, the location and character of intangible assets is often a troublesome problem.[11] In *Harris* v. *Balk, supra*, the United States Supreme Court held that a simple debt "... clings to and accompanies ... [the debtor] ... wherever he goes. ... It is not a question of possession in the foreign state for possession cannot be taken of a debt ... as tangible property might be taken possession of." *Id.* at 222-23. In the decision of that case emphasis was placed on the fact that because a *simple* debt was involved, "... Balk could have sued Harris in Maryland to recover his debt notwithstanding the temporary character of Harris' stay there." *Id.* at 224.

More than sixty years have passed since the decision in *Harris* v. *Balk* and the question before this court is whether within the confines of due process an insurance policy may be viewed as a simple debt subject to attachment wherever the debtor (the insurance company) may be found. As the New York Court of Appeals saw the problem in *Seider*:

> "The whole question, therefore, is whether [the insurer's] contractual obligation to defendant is a debt or cause of action such as may be attached. The ... policy is in customary form. It requires [the insurer] among other things, to defend [the insured] in any automobile negligence action and, if judgment be rendered against [the insured], to indemnify him there-

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[11] See *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1156-59 (1966) (hereafter Jurisdiction to Adjudicate); *Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 Colum. L. Rev. 550, 551 (1967). See also *Comment*, 16 Buffalo L. Rev. 769 (1967; *Case Note, 8 B.C. Ind. & Com. L. Rev.* 147 (1966).

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> for. Thus as soon as the accident occurred there was imposed on [the insurer] a contractual obligation which should be considered a 'debt' within the meaning of CPLR 5201 and 6202." *Seider* v. *Roth, supra,* at 113, 269 N.Y.S.2d at 101.

Automobile liability insurance policies have evolved through the years into documents representing relatively complex collections of rights and obligations involving the liability carriers, their insureds, claimants, the general public, and the state in which the policy was issued. Although the duty to defend is unquestionably a benefit accruing to an insured by reason of a liability insurance contract, this duty cannot arise until jurisdiction is obtained over the insured.[12] Nor can obligation to indemnify arise until a judgment has been entered against the insured. Further, when viewed in context, the obligation to defend is an important right of the insurer, essential in protecting its financial interest in the outcome of the litigation.

In addition to the complexity of the obligation to defend, numerous other factors in an insurance contract, such as continuing duties of the insured to his insurance company and the enumerated exclusions present in the policy, militate against characterization as a simple debt.[13] But the fact that there are problems in characterizing an insurance policy as a simple debt does not necessarily import a denial of due process. In the absence of harm to the defendants,

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[12] *Seider* v. *Roth,* 17 N.Y. 2d 111, 115, 269 N.Y.S. 2d 99, 103 (1966) (Burke dissenting). See *Siegel,* CIVIL PRACTICE COMMENTARY, *McKinney's Consolidated Laws,* 7B, at 27-30 (1967 Supp.); *Comment, 67 Colum. L. Rev.* 550, 555 (1967).

[13] An example of one such obligation is the notice provision (Condition 3, Specimen Insurance Policy of General Accident) requiring the assured to forward every demand, summons, etc., received by him in connection with an accident.

they would have no standing to complain. In addition, because the litigation is at an early stage there may be some question as to whether a potential harm is sufficiently imminent to sustain objection on due process grounds.

In this court's view, Mrs. Devinney has standing to make the present challenge. *Ex hypothesi* the policy is property or it cannot be attached. Also *ex hypothesi* the present attachment is the first step in an attempted divestiture of the property. Neither is there any question as to the time of Mrs. Devinney's challenge. If the attachment is upheld and the litigation allowed to proceed, she will necessarily lose some portion of her property no matter what course the lawsuit ultimately takes. If the case is defended, under the New York court's own characterization of the property in *Seider*, a part of it must necessarily be consumed in defense of the action.[14] More importantly by virtue of § 320 N.Y.C.P.L.R., appearing in defense of the action submits a defendant to personal jurisdiction in

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[14] At the time of attachment the obligation to defend appears the only conceivable *res*. Certainly under the wording of §5201 N.Y. C.P.L.R. the Court of Appeals does not consider the obligation to indemnify as matured. Thus, no matter what the outcome, any defense of the action necessarily consumes some of the *res* represented by the obligation to defend. The fact that Mrs. Devinney may prevail on the merits has no bearing because even in so prevailing, the value of the initially attached *res* will be totally consumed. Nor is the fact that counsel fees vis-a-vis the potential liability are a relatively small amount of constitutional moment since counsel fees certainly exceed *de minimus* proportions.

The argument that the property rights of Mrs. Devinney in this *res* are not of the usual sort does not affect her standing to challenge the constitutionality of the present procedure, for the basis of jurisdiction is clearly by way of attachment rather than by direct action against the insurance company. The question of whether Mrs. Devinney or the insurance company is the real party in interest is considered at pp. 15-18, *infra*.

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New York.[15] The end result of such submission might be a valid judgment exceeding the policy limits. If, on the other hand, the defendants choose to default, the garnishee loses its ability to control the defense which is an important guarantee under its contract with the assured.[16] Moreover by refusing to appear, defendants may place their rights to a later defense and indemnity in jeopardy.[17] Thus,

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[15] Section 320 N.Y.C.P.L.R. in relevant part provides:

"*Defendant's appearance.*

* * *

(c) *When appearance confers personal jurisdiction, in certain actions.*

In a case [such as the present one] where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not the equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted at the time of appearance by motion or in the answer, unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." *See generally, Note, Jurisdiction Service and Appearance Under the CPLR. 37 St. John's L. Rev.* 285 (1963).

[16] See Specimen Insurance Policy of GENERAL-ACCIDENT, Coverage A & B. By virtue of § 167 N.Y. Insurance Law, the insurer may not relitigate the merits of the defaulted case, that being foreclosed by the default. See pp. 17-20, *infra*, where the operation of §167 N.Y. Insurance Law is discussed in detail.

[17] The present observation is prompted by a dictum in Chief Judge Fuld's opinion in *Simpson* v. *Loehmann*, N. Y. 2d , n. 2, summarized in N.Y.L.J., p. 1; col. 4 (January 24, 1968). In discussing the objection that the *Seider* procedure invites the insured to withhold cooperation, the Chief Judge commented:

". . . Nor is there any merit to the defendant's argument—which was not raised below—that the attachment impairs contract obligations by 'literally inviting the insured to withhold cooperation.' If the insured does refuse to cooperate, the insurer's recourse is clear; he may withdraw and assert such lack of cooperation as a defense in any action brought against him under section 167 of the Insurance Law."

a serious question arises whether this attachment, which involves a taking of what is *ex hypothesi* property, meets the standards of due process of law.

The landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) reflected a rethinking on the part of the Supreme Court of traditional notions of due process as it related to jurisdiction.[18] The court there held that "due process requires only that . . . [there be] . . . certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316. See also *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

It is settled that at the present state of development in American law[19] an attempt to obtain in personam jurisdic-

If such a procedure is allowed and if the insured chooses to default, the insurance company will not be liable for the amount of the default up to policy limits. However, a finding by a New York court that the insured failed to cooperate would presumably strip the insured of his coverage in the event he was sued in another state and that state gave the New York court's judgment "full faith and credit." Whether a sister state would be required to give full faith and credit to such a New York judgment on the grounds that the insurance company and its assured are in privity is a complex question which this court is not in a position to resolve. (Professor Seigel has expressed the view that a sister state would not be so bound. See *Seigel, Simpson Upholds Seider—Problems for Both Sides, Notes and Views*, N.Y.L.J. (January 24, 1968), Part II in a III Part Series). Suffice it to say that if no full faith and credit is required then the *Seider* procedure is a complete waste of time and money for both parties to the litigation. If full faith and credit is required the entire procedure acts as a "velvet covered hammer" coercing the insured to submit to in personam jurisdiction when no basis for the assertion of it is present.

[18] See generally, Kurland, *The Supreme Court, The Due Process Clause And The In Personam Jursdiction of State Courts*, 25 U. Chi. L. Rev. 569, 577-86 (1958).

[19] The German approach to this problem has been more expansive. Although the Federal Republic of Germany is operated under a federal system, section 23 of the German Code of Civil Procedure allows

tion over the present defendants would not comport with due process, even if the New York statutes purported to allow it.[20] That conclusion follows from the fact that the only nexus this litigation has with New York is the plaintiff's residence. The accident occurred in New Jersey; the defendants are residents of New Jersey; the witnesses are more readily available in New Jersey than in New York.[21] Further, the plaintiff was treated in a New Jersey hospital, presumably by New Jersey physicians, obviating New York's interest, at least in the short run, in the medical care given its citizen.[22] Thus, in this court's view, even under the broadest, functionally-oriented analysis, any attempt to assert personal jurisdiction over these defendants would violate due process.

It is this inability to obtain in personam jurisdiction over the named defendants, coupled with the fact that an insurance policy is not a simple debt, that makes the attachment particularly suspect. As noted previously, Mrs. Devinney cannot defend her property without personally appearing in the action, thereby exposing herself to a possible judgment in excess of her policy limits. It is here that the fundamental difference between a simple debt, anchoring the

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full rather than limited jurisdiction to adjudicate within a district where the debtor's property is located provided the debtor has no domicile within the country. See von Mehren & Trautman, *The Law of Multistate Problems: Cases and Materials on Conflict of Laws,* p. 673 (1965).

[20] See, e.g., the discussion in *Hanson* v. *Denckla,* 357 U.S. 235 (1958) at 250-55.

[21] While of minimum significance in this case, the accident having occurred in an adjacent state, this is of increasing importance where the accident occurs in a jurisdiction far removed from the New York forum. One such example is *American Int'l Underwriters Corp.* v. *Victor,* 265 F. Supp. 556 (S.D.N.Y. 1967), where the accident occurred in Da Nang, Republic of Viet Nam.

[22] See *Watson* v. *Employers Liability Ins. Co.,* 348 U.S. 66, 72 (1954) (dictum).

rationale in *Harris* v. *Balk*, 198 U.S. 215 (1905), and the complicated composite of rights and obligations represented by an insurance contract is of crucial importance. The simple debt contemplated by *Harris* v. *Balk* is fixed in amount. Because the defendant can have no influence on its size, he faces the simple choice of whether to forfeit this fixed amount and avoid in personam jurisdiction or defend the action and risk a judgment in excess of the value of the *res*. Here, the amount of the debt is not fixed and may be greatly influenced by the defendants' choice of appearance or nonappearance. It is this dilemma, operating to coerce the defendant into an otherwise unattainable submission to personal jurisdiction, which amounts to a denial of fair play and substantial justice vis-a-vis Mrs. Devinney. On balance, then, the mere characterization of an automobile liability insurance policy as a debt without more is not sufficient to satisfy due process. *Cf. Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930); *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916).[23]

It is at this point that Judge Keating's analysis, which in his words "is a recognition of realities and not fiction," becomes relevant. In Judge Keating's view, the insurance company is the real party in interest, and Mrs. Devinney is merely a fictional representative.[24] Implicit in this view is

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[23] "In the light of the emerging concept of personal jurisdiction, the *quasi in rem* procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff. . . ." *Carrington, supra*, note 6 at 306. See *Jurisdiction to Adjudicate, supra*, note 11 at 1132, suggesting that Home Insurance stands for the proposition that exercises of jurisdiction that are not clearly justified by the relation of the parties litigant to the forum or by other litigational and enforcement considerations may be declared unconstitutional.

[24] Judge Keating's approach in treating Mrs. Devinney as a mere fictional defendant presents difficulties. See pp. 17-20, *infra*. However, dealing only with his contention that the present contacts with New York would be sufficient to support a direct action against the insurer were the legislature to enact one, such an assertion seems unwarranted.

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the feeling that due process vis-a-vis Mrs. Devinney is not the relevant concern, for if there is a serious threat of a judgment in excess of policy limits, she can always protect herself by refusing to authorize an appearance on her behalf. Judge Keating's analysis goes on to suggest that by virtue of its doing business in New York, and the minimal inconvenience of its defending the action here as opposed to New Jersey, that "service of process on the real party defendant—the insurer—is sufficient to compel it to

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Judge Keating relies heavily on the dictum in *Watson* v. *Employers Liability Ins. Co.*, 348 U. S. 66, 72 (1954), supporting Louisiana's direct action statute:

> ". . . Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call on friends, relatives or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for the recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment."

However, in the same opinion it was stated:

> "If [the motion to dismiss] . . . is granted, Mrs. Watson but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and *her claim is for injuries from a product bought and used there.*" (*Id.* at 72.) (Emphasis added.)

The above-emphasized contacts now form the basis for in personam jurisdiction in New York and other states. See, e.g., § 302, N.Y.C. P.L.R. However, no direct action statute presently in existence permits a direct action against the insurer based on the minimum contacts suggested by Judge Keating. See *La. Stat. Ann.* 22:655 (1959) (accident occurring in the state); *Wis. Stat.*, 204.30(4), 260.11(1) (1959) (accident occurring in the state and confined to automobile torts); *R.I. Gen. Laws Ann.*, 27-7-2 (1956) (action on locally issued policy if the assured cannot be served within the state). See also *P.R. Laws Ann.*, Tit. 26 §§ 2001, 2003(1) (1964) (accident occurring in the jurisdiction). See generally Note, *Direct Action Statutes: Their Operational and Conflict-Of-Laws Problems*, 74 Harv. L. Rev. 357 (1960); *Developments In The Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

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defend in this state, provided it transacts business here and is subject to the jurisdiction of our courts.[25]

Normally, there would be some question in this court's mind as to the standing of the insurance company, which is not a party to the present proceeding, to assert that its property is being taken without due process. However, here there is no question that Judge Keating's analysis, by treating the insurer as the real party in interest under what is, in effect, a judicially created direct action, confers such standing at least for the purposes of examining the constitutionality of the *Seider* attachment procedure. That is, we must either discount Judge Keating's analysis or examine the real harm to the insurer which might occur as a direct result of the procedure sanctioned under *Seider* v. *Roth*.

In any defense made here, other than an attack on jurisdiction, the policyholder will be subject to in personam jurisdiction with resultant liability for any judgment rendered in excess of policy limits (the *res* in the present case). (See § 320 N.Y.C.P.L.R. which specifically abolishes the

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[25] *Simpson* v. *Lochmann*, *supra*, at , 36 U.S.L. Week 2444. In the present state of development of the attachment procedure sanctioned in *Seider* v. *Roth*, there appear to be few if any limiting conditions on the bringing of an action in New York. It appears that the plaintiff need not even be a resident of New York. See *Nationwide Ins. Co.* v. *Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967) (plaintiff a Norwegian citizen). Of course, if the plaintiff is not a New York resident he may run the risk of having his action dismissed on the basis of forum non conveniens. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). However, if the plaintiff is a resident of New York, the New York courts could not dismiss on this basis even if on the facts of the case New York would have little or no interest in the outcome of the litigation. See, e.g., *Colhard* v. *Beach*, 81 App. Div. 582, 81 N.Y.S. 619 (1st Dept. 1903). Federal district courts on the other hand have wide discretion to transfer such cases to other districts in the interests of convenience and justice. 28 U.S.C. § 1404 (1964). The only limitation is that the case be transferred to a district where the plaintiff could have originally brought the action. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

special appearance in New York.)[26] This places GENERAL ACCIDENT, a fiduciary with regard to its assured, in an unenviable position. In any action where potential liability exceeds the actual insurance coverage, no knowledgeable insured would knowingly subject himself to the personal jurisdiction of a court where the amount which might be recovered could exceed the limits of his insurance coverage. Even if an insured, unversed in the complexities of New York's procedural statutes, should give the insurer no specific instructions with respect to the defense of the negligence action brought against him, the insurer could not, consistent with the best interests of its assured, haphazardly expose him to personal liability in excess of policy limits.[27] If the situation is adequately explained to the insured, he will most likely refuse to allow the company to enter an appearance on his behalf. This is his right under § 320 N.Y.C.P.L.R. If he chooses not to appear, any unauthorized appearance on his behalf by attorneys retained by the insurance company would be a nullity as against him. See *Amusement Securities Corp.* v. *Academy Pict. Dist. Corp.*, 251 App. Div. 227, 295 N.Y.S. 436 (1st Dept. 1937); *Earl S. Peed Organization, Inc.* v. *Gray*, 40 Misc. 2d 471, 243 N.Y.S. 2d 111 (Sup. Ct. N.Y. 1963).

If the insured chooses not to appear, there is no way that the insurance company can appear to litigate its in-

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[26] See notes 13-17 *supra* and accompanying text. We do not here decide whether the present procedure would be constitutional if a limited appearance were allowed.

[27] *Cf. Brown* v. *United Fidelity and Guarantee Co.*, 314 F. 2d 675 (2d Cir. 1963); *Harris* v. *Standard Accident & Ins. Co.*, 297 F. 2d 627 (2d Cir. 1961). While the above cases deal with an insurer's duty to its assured with regard to settlement of claims which may exceed insurance coverage, we believe the principle that an insurance company must carefully consider the position of its assured is applicable in the present case. For a thorough review of the insurer's obligations vis-a-vis its assured, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1144-45 (1954).

terests. Again, the fundamental differences between a simple debt and a highly sophisticated liability insurance policy become apparent. The obligation to defend the insured is not to be regarded simply as a duty owed to the holder of the policy but also as an essential right which the insurance company reserves to itself in order to protect itself against unwarranted liability claims. In normal circumstances the insurance company maintains this right, the only reason recognized for defeasance being an irreconcilable difference of opinion between the insurer and its assured. See *Prashker* v. *United States Guar. Co.*, 1 N.Y. 2d 584, 593, 154 N.Y.S. 2d 910, 917 (1956); *Reynolds* v. *Maramorosch*, 208 Misc. 626, 144 N.Y.S. 2d 900 (Sup. Ct. N.Y. 1955). In that event the insured may conduct the defense but if he acts unreasonably he will forfeit the insurance coverage. In the presently hypothesized situation the insurance company is faced with the prospect of a default judgment. If this default occurs, and if, after damages are fixed and entered at an inquest, the judgment remains unsatisfied for 30 days, the plaintiff may sue GENERAL ACCIDENT directly for the assessed damages up to policy limits. (See § 167(1)(b) N.Y. Insurance Law.) In that eventuality, GENERAL ACCIDENT could not relitigate the question of liability, that question having been determined by the default. *Manard* v. *Hardware Mutual Cas. Co.*, 12 App. Div. 2d 29, 207 N.Y.S. 2d 807 (4th Dept. 1960), *leave to appeal denied*, 12 App. Div. 2d 891, 212 N.Y.S. 2d 1020; *Lauritano* v. *American Fire Ins. Co.*, 3 App. Div. 2d 564, 162 N.Y.S. 2d 553 (1st Dept. 1957), *aff'd without opinion*, 4 N.Y. 2d 1028, 177 N.Y.S. 2d 530 (1958); *Abrams* v. *Maryland Casualty Co.*, 98 N.Y.S. 2d 520 (Sup. Ct. Kings, May 12, 1950), *aff'd without opinion*, 278 App. Div. 951, 105 N.Y.S. 2d 991 (2d Dept.), *aff'd without opinion*, 303 N.Y. 698, 103 N.E. 2d 58 (1951).

Appendix "C"

Opinion of Croake, D.J. (Podolsky v. Devinney)

In a direct action against the insurer, although several defenses by the insurer are permitted,[28] the only one which appears to be useful under the present circumstances is a defense based on the insured's failure to cooperate in defending the action. However, it seems highly improbable that the New York courts would permit an insurer to raise such a defense when the company itself had advised the insured that it was not in his best interests to appear.[29]

The dilemma facing GENERAL ACCIDENT in the present case and all insurance companies who are forced to defend actions in New York under the rule of *Seider* v. *Roth* is an inextricable one. The basic problem is that GENERAL ACCIDENT is not a simple garnishee, unaffected except in a collateral way by a finding of liability. It is concerned with the defense of its property which as noted above may be taken without the company ever having an opportunity to be heard.[30]

The plaintiff, recognizing the conflicting interests between the insurer and its assured which might lead to a refusal of an authorization to appear, seeks to obviate these difficulties by an offer to stipulate that in no event will damages be permitted to exceed the limits of liability coverage. We do not believe that the constitutionality of a particular rule of law turns on the existence or non-existence of an offer to stipu-

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[28] Such defenses as nonexistence of a valid policy, fraud, lack of notice, and failure of cooperation by the insured are available to the insurer.

[29] But see note 17 *supra*. See also *Seigel*, note 17, *supra*, suggesting that Chief Judge Fuld's dictum is not likely to be followed.

[30] "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1913). It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

late.[31] The fact that a particular stipulation may make it more attractive for the defendants to appear in this action is no guarantee that they will do so. Besides the potential liability, the defendants might prefer not to appear for any number of reasons, e.g., belief that their interests will better be protected in the New Jersey courts. In any event, a proffered stipulation, because it depends on the decision of the individual litigant in each case, is not sufficient to distinguish this case from others in the same category.

We do not lightly determine to put aside a procedure passed on and approved by the New York Court of Appeals on two occasions. However, although the Court of Appeals sought only to protect its citizens, in our view it cannot do so at the expense of residents of a foreign forum whose only connection with this forum is the happenstance of their injuring a New York resident. More importantly, as it may well be in the interest of the insured defendants to refuse to authorize an appearance, the present attachment procedure can operate to deprive the defendants' insurance company of its property without the plaintiff ever having demonstrated liability.

The Court of Appeals in *Simpson* sustained the constitutionality of the *Seider* procedure under two basic theoretical approaches. The first treated the problem in traditional terms, maintaining the "fiction" that the insurance policy is attachable property belonging to the named defendant. The second employed a functional analysis that put the

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[31] A stipulation requires the consent of both parties. *Winchester Drive-in-Theater* v. *Twentieh Century Fox Film Corp.*, 232 F. Supp. 556 (N.D. Cal. 1964); *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 183 F. Supp. 394 (S.D.N.Y. 1953). The affidavit of Pillon, Attorney for the petitioners in this case, frankly advises this court that Mrs. Devinney will not at this time oppose a personal appearance. However, this does not bind her and she can withdraw the consent before such an appearance is entered on her behalf.

property in the hands of the insurance company as the real party in interest. After long and painstaking deliberation this court believes that under either approach there remains a taking which does not comport with "traditional notions of fair play and substantial justice."

In accordance with the foregoing the writs of attachment are ordered vacated and this action is dismissed for want of jurisdiction.

So Ordered.

Dated: New York, N. Y.
February 26, 1968

Thomas F. Croake
U. S. D. J.

Appendix "C" MARCH 4, 1968.

SUPREME COURT, APPELLATE DIVISION,

SECOND JUDICIAL DEPARTMENT.

Christ, Acting P. J., Brennan, Rabin, Benjamin and Martuscello, JJ.

LARS VAAGE,

Respondent,

v.

CLINTON JAMES LEWIS et al.,

Appellants.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Intervenor.

APPEAL from an order of the Supreme Court (Harold Tessler, J.), dated November 18, 1965 and entered in Queens County, which denied defendants' motion to vacate an order of attachment and a levy thereunder and to set aside a service of the summons under the levy. The intervenor appears on the appeal by permission of the Appellate Division.

James T. Whalen (Charles G. Pillon of counsel), for appellants.

Charles G. Pillon, for intervenor.

Schwartz, Levitt & Sommer (Arthur Blitz of counsel), for respondent.

C H R I S T, Acting P. J. This appeal brings to the surface another of the difficult ramifications of Seider v. Roth (17 N Y 2d 111), recently adhered to in Simpson v. Loehmann (21 N Y 2d _____, dec. Dec. 29, 1967). The four opinions in Simpson demonstrate the complexity and dissatisfaction with the Seider v. Roth principle that a plaintiff may obtain in rem

jurisdiction over a defendant by attaching the latter's insurance company's obligation to defend and indemnify. The order under review denied the defendants' motion inter alia to vacate the attachment.

The facts are undisputed. Unlike Seider and Simpson, the plaintiff in this appeal is not a New York resident. He is a Norwegian. The defendants are North Carolinians, the automobile accident occurred in North Carolina, the insurance carrier is an Ohio insurance company and the insurance policy covering the defendants was issued in North Carolina. The only New York contact is the rather tenuous fact that the defendants' insurance company is authorized to do business in New York.

A close reading of Seider and Simpson and the commentaries on those cases shows that the New York residency is a crucial consideration (see, e.g., Prof. David D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N Y., Book 7B, 1967 Pocket Part, pp. 13-21, 23-31; 67 Col. L. Rev. 550 [1967] [Garnishment of Intangibles,etc.]). Yet we must be mindful of the fact that the accident of a plaintiff's residence does not bear directly on the substance of a court's jurisdiction and power over a defendant, particularly when an in rem concept is involved. When the res is here in New York, that is the jurisdictional fulcrum.

The conclusion of Chief Judge Fuld's analysis in Simpson is that "where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, it has a substantial and continuing relation with the controversy" and "[f]or jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large" (emphasis added). Judge Breitel, in concurring, anticipated

the danger that the present appeal exemplifies: "On the basis of the rule in the Seider case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State". Judge Bergan concurred in this opinion. Judge Burke dissented in Simpson, as he did in Seider, and he spelled out anew that a state must have a sufficient interest in an insurance relationship or in an accident in order to justify the interference of its courts in an adjudication (see, Watson v. Employers Liability Assur. Corp., 348 U. S. 66). Neither consideration is present in this appeal. Judge Burke concluded as follows:

> "Seider may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, Seider would seem to allow) an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent, only if we may say to such persons that no matter which state or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character."

The commentary attacks upon Seider are amply set forth in the opinions in Simpson. However, quickly

wing the decision in Simpson, Professor Siegel had to say:

"This doctrine, which determines whether a state may exercise jurisdiction based on the 'contacts' that the state has with the case, evolved and has been applied in in personam cases, notably those involving 'longarm' statutes such as CPLR 302. It has not been accorded a place in in rem cases up to now but, for the purpose of determining the constitutionality of what Seider seeks to do, it appears to have equal relevance.

"The very fact that this 'contacts' doctrine, born in in personam cases, seems obviously in point in the Seider case, strongly corroborates the argument so frequently made: that Seider is merely an in personam case parading in an in rem disguise. * * *

"As Judge Burke further indicated, Seider cases are being brought even where the plaintiff is not a New York resident, leaving the mere fact of the insurer's local office as the exclusive basis for the exercise of jurisdiction. Citing one such case [our present appeal], in which a Norwegian brought suit in New York against a North Carolinian for an accident occurring in, and relative to an insurance policy issued in, North Carolina, Judge Burke said:

> 'What purpose allowing [this] suit to be brought here, other than possibly increasing [plaintiff's] hope for damage award, is beyond me.'

"The issue may ultimately turn upon forum non conveniens, a doctrine which determines what cases, involving nonresidents, the state courts will or will not accept." (Simpson Upholds Seider — Problems for Both Sides" by Prof. David D. Siegel, N. Y. Law Journal (Jan. 23, 24 and 25, 1968), Jan. 23, 1968, p. 4, col.6).

Although the defendants have been understandably reticent about advancing theories like forum non conveniens, public policy and lack of sufficient jurisdictional contacts (all out of fear of unintentionally effecting an in personam jurisdictional base), we cannot and should not close our eyes to the realities of the facts before us in this case.

The plaintiff is a nonresident. The solitary nexus for the New York courts is the fact that the defendants' insurance carrier is a foreign corporation authorized to do business in New York. Under no circumstances could these facts support an exercise of jurisdiction by the New York courts without adversely affecting the administration of justice in this State by an influx here of unwanted and unnecessary lawsuits (Pietrarois v. New Jersey & N. R. Rw. & Ferry Co., 197 N. Y. 434). We are obliged under the circumstances of this case, where no special considerations are advanced, to dwell on the aptness of the forum non conveniens doctrine. Essentially, it is the convenience of our courts, not that of the litigants, and the practical ramifications which determine the acceptance or rejection of the doctrine in a particular case (Williams v. Seaboard Air Line R. R. Co., 9 A D 2d 868;

see, also, Gilchrist v. Trans-Canada Air Lines, 27 A D 2d 524). For this compelling reason, and also because we believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (Hanson v. Denckla, 357 U. S. 235; see, Lefcourt v. Sea Crest Hotel & Motor Inn, 54 Misc 2d 376), the order should be reversed, on the law, without costs, and the defendants' motion granted.

BRENNAN, RABIN, BENJAMIN and MARTUSCELLO, JJ., concur.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANT IN SUPPORT OF JURISDICTION

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANT IN SUPPORT OF JURISDICTION

This brief is filed pursuant to Rule 16(5) to advise the Court of a new, unpublished memorandum-decision of the New York Court of Appeals in the case of *Simpson* v. *Loehmann*, 21 N.Y.2d 305 (1967) [Jurisdictional Statement, Appendix "A"].

Following the original decision the Appellant in *Simpson* moved for reargument in the New York Court of Appeals. This motion for reargument was denied in a memorandum-decision, a copy of which is set forth in Appendix "D".

In this memorandum-decision the Court of Appeals held for the first time that, even though the defendant insured appears, defends on the merits and loses, ". . . there may not be any recovery against the defendant in this sort of

case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits." This is an apparent exemption carved out of CPLR §320 in direct contradiction to the express legislative purpose of requiring defendants whose property is attached, if they wish to defend on the merits, to appear generally and litigate the entire dispute without limit as to liability. The attempt fails to remedy the basic faults of this attachment procedure.

The ostensible relief afforded by the memorandum-decision is illusory. If the defendant appears, answers and litigates on the merits, the judgment of the New York Court will be *res judicata* in any subsequent action. Thus, if, in the *Victor* case, the defendant appears, defends on the merits and loses the plaintiff will only be able to *recover* the limits of Hanover's policy, *i.e.*, $20,000, according to the subject memorandum-decision. But this does not mean that the *judgment* in the New York action cannot exceed the policy limits. The net result is that plaintiff will be able to sue on the New York judgment in a jurisdiction, such as Maryland, where the defendant insured is subject to personal jurisdiction and recover any amount in excess of the $20,000 policy limits recovered in New York. At the very least, the New York judgment, being on the merits with the defendant personally before the Court, will settle the liability question in any subsequent suit.

In the unlikely event that the New York judgment will not be *res judicata,* the result will be at least two separate suits on the merits where an amount in excess of the policy limits is sought. Such a multiplicity of suits may result in different decisions as to liability and definitely will impose upon both the insured and insurer and their witnesses added expense and inconvenience. In addition, the insured

has no protection in those situations where, a question of coverage existing, the insurer defends under a reservation of rights agreement or where the insurer disclaims liability for a cause, such as lack of cooperation, after defense on the merits commences.

The memorandum-decision of the New York Court of Appeals in the *Simpson* case in no way relieves the insurer or insured of the problems discussed in the Appellant's Statement as to Jurisdiction nor does it dispose of the substantial constitutional questions raised on this appeal.

Respectfully submitted,

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APPENDIX "D"

Memorandum

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 267

Unrevised and Uncorrected. Not for Publication.

WILLAM A. SIMPSON, as father and natural guardian of MICHAEL SIMPSON, an infant, and WILLIAM A SIMPSON,

Respondents,

vs.

FRED LOEHMANN,

Appellant.

Motion for reargument denied. A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced either in this court or in the courts below. (See, e.g., *Mississippi Shipbuilding Corpn.* v. *Lever Brothers Co.*, 237 N.Y. 565; *Matter of United States of Mexico* v. *Schmuck*, 293 N.Y. 768; see, also, Cohen and Karger, Powers of the New York Court of Appeals, pp. 628, 694-696.) Indeed, the appellant now suggests a meaning and interpretation of the insurance policy attached which is inconsistent with that subscribed to and acquiesced in by him on the appeal proper and on which the case has heretofore been considered and decided. It would serve no useful purpose for us to entertain at this juncture arguments addressed to details relating to the coverage or non-coverage of that policy of insurance now pressed upon us for the first time.

Further, the appellant's argument based on the effect of CPLR 320(c), also asserted for the first time, fails to take account of the explicit statement in the court's opinion (21 N Y 2d 305, 310) that "neither the *Seider* decision [17 N Y 2d 111] nor the present one purports to expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached, that is, the liability insurance policy. For the purpose of pending litigation, which looks to an ultimate judgment and recovery, such value is its face amount and not some abstract or hypothetical value." This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits. Consideration of CPLR 320(c) and its effect generally must, of course, await future cases.

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Motion for reargument and for a stay denied in a memorandum.

UPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM, WITH BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

NOTICE OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

SIRS:

PLEASE TAKE NOTICE that CARL S. VICTOR, appellee herein, respectfully moves this Court under Rule 16, subdivisions 1(b), and 1(d) of the Revised Rules of the Supreme Court of the United States (a) to dismiss the instant appeal or (b), in the alternative, to affirm, on the ground that said appeal does not present any substantial Federal question and on the further ground that neither appellant Hanover

Insurance Company of New York nor its insured Lyon Associates, Inc., has been deprived of any constitutional right by the decisions of the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111, *Simpson* v. *Loehmann*, 21 N.Y. 2d 305, reargument denied, and *Victor* v. *Lyon Associates, Inc.*, 21 N.Y. 2d 305, and on the further ground that it is manifest without need for further argument that the constitutional questions raised by appellant Hanover Insurance Company of New York are unsubstantial.

Dated: New York, N.Y.
June 14, 1968

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF OF APPELLEE IN SUPPORT OF MOTION

(A) The Attachment Herein is Not Violative of Any Constitutional Right of Appellant-Insurer.

Appellant does not, and indeed could not, dispute the validity of the New York Court of Appeals' premise in *Seider* v. *Roth*, 17 N.Y. 2d 111, that as a liability insurer, "it has agreed to defend in any place where jurisdiction is obtained against its insured" (17 N.Y. 2d at 114). Hav-

ing agreed with its insured to defend any action embraced in the policy, wherever suit is instituted, appellant is hardly in a position to complain of having to defend an action commenced by a New York resident in the State of New York, the very State of appellant's incorporation. The Court of Appeals, in "requir(ing) the insurer to defend here (in New York)" (*Seider* v. *Roth*, 17 N.Y. 2d at 114), has imposed no burden on appellant in excess of that assumed at the very inception of its policy, much less a burden amounting to undue interference with its interstate business as suggested by appellant on page 11 of its jurisdictional statement. The defense of lawsuits wherever commenced is appellant's very business.

True, the insured was not personally served with process in New York, but appellant makes no claim—and never has—of any conceivable genuine interest of its own respecting the place in which jurisdiction is ultimately acquired (see Ausubel, *Seider Re-examined*, New York Law Journal, April 24, 1968, p. 1 and April 25, 1968, p. 1). As the author states (April 25, 1968 at p. 4): "* * * (I)t is highly doubtful that an insurance carrier in a mobile age such as this might reasonably predict where it might be required to defend a suit arising out of an accident in which its insured was involved, or that premiums are based upon such a consideration."

Appellant's principal objection to the attachment of its policy is its claim on page 7 of the jurisdictional statement that it will be required to pay out the proceeds of the policy despite the fact that its non-resident insured "rather than submit itself to unlimited personal liability in this foreign forum, has refused to allow (appellant) to appear and

contest on the merits." In its supplemental brief, appellant seems to recognize that, under the decision of the Court of Appeals on reargument of *Simpson* v. *Loehmann*, the possibility that the interposition of a defense on the merits of appellee's claim may subject the insured to unlimited liability in this lawsuit has now been eliminated.

However, let us assume *arguendo* that despite the adoption by New York of a rule permitting a limited appearance, the insured, for reasons of its own, persisted in refusing to permit appellant to defend appellee's action. Appellant, we presume, would likewise persist in claiming that under *Seider* it would have to pay appellee the proceeds of its policy on such a forced default, in violation of its policy right to defend on the merits any case wherein it may ultimately be required to pay money.

There is no validity to the contention that under the law of New York, once a liability policy is attached, the insurer must pay out its proceeds whether or not it is given an opportunity to defend the underlying claim. We know, from the express language of the Court of Appeals, that an insurer may, after attachment, withdraw from the lawsuit entirely once the insured prevents or obstructs the defense of the lawsuit. As the Court wrote (*Simpson* v. *Loehmann*, 21 N.Y. 2d 305, 309 at footnote 2): "* * * If the insured does refuse to cooperate, the insurer's recourse is clear: he may withdraw and assert such lack of co-operation as a defense in any action brought against him under section 167 of the Insurance Law." *Podolsky* v. *Devinney*, SDNY, 38 U. S. Law Week 2881, quoted at pages 21a-42a of appellant's jurisdictional statement, also acknowledges this

(see pp. 32a-33a, footnote 17). *Podolsky* was decided prior to the decision of the New York Court of Appeals on reargument of *Simpson* and its opinion as to the constitutionality of *Seider* was rendered academic by the subsequent action of the New York court. Surely, however, *Podolsky's* acknowledgment that the insurer may withdraw where the insured fails to cooperate remains totally unaffected by the opinion in *Simpson* on reargument.

Probably appellant would be permitted by the New York courts to interpose a defense on the merits despite any refusal by the insured so to allow. Since, under the *Simpson* decision on reargument, appellee can never recover more than the proceeds of the policy, the insurer is really the only party in interest. But, even assuming that an insurer is powerless to interpose a limited appearance in defense of the action where the insured refuses to permit it, there is not the slightest hint in *Seider* or *Simpson* that New York would compel an insurer to pay out its policy proceeds on such a forced default. As aforesaid, all indication from the Court is precisely to the contrary.

In view of the foregoing, it is also very plain that New York's attachment procedure does not at all violate the so-called "No Action" clause in appellant's policy. That clause reads as follows:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment

> against the insured after actual trial or by written agreement of the insured, the claimant and the company."

As stated earlier, the New York decisions do not even intimate that appellant would ever be required to pay anything in the absence of full co-operation by the insured and an equally full opportunity for appellant to defend the lawsuit commenced by appellee. As the Court wrote in *Simpson* (21 N.Y. 2d at 311):

> "The argument that our decision sanctions a 'direct action' against the insurer is sufficiently answered by what we wrote in *Seider* v. *Roth* (17 N.Y. 2d, at p. 114):
>
> 'It is said that by affirmance here we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured.' "

Appellant simply fails to appreciate that the New York attachment procedure does not even purport to eliminate a single one of its contract rights.

Patently without merit, as well, is appellant's further claim that the attachment of its policy actually prevents it from defending appellee's lawsuit. Obviously, the duty to defend has not been seized by the attachment in the sense that it can no longer be carried out. *Seider* specifically announces that an insurer is "requir(ed)" to defend in New York a lawsuit commenced through the attachment procedure (17 N.Y. 2d at 114).

Appellant further complains that the attachment of its policy prevents it from exercising its rights and fulfilling its obligations to the same insured under a different policy which does not cover the instant collision. Under *Seider* and *Simpson,* the attached obligations are of course only those which arose when the instant collision occurred, as those obligations alone may ripen into a duty of payment of appellee's claim.

Appellant advances the further argument that the attachment also prevents it from exercising its duties respecting one Bishop, whose motorcycle was driven by appellee at the time of the collision. The attachment, of course, accomplishes no such thing. Clearly, under the New York cases now under appellant's attack, each separate claim against its insured which may result either from the same occurrence or from other covered accidents gives rise to a separate and distinct obligation of defense and possible payment.

(B) The Attachment Herein is Not Violative of Any Constitutional Right of the Insured.

Harris v. *Balk,* 198 U. S. 215, squarely holds that a debt may be validly attached in any State where the debtor is amenable to personal service of process. Here, the debtor (appellant Hanover Insurance Company of New York) is a New York corporation which was served with attachment process in that State. *Pennington* v. *Fourth National Bank,* 243 U. S. 269 reaffirms *Harris,* as follows:

> "* * * (G)arnishment or foreign attachment is a proceeding *quasi in rem.* * * * The thing belonging to

> the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.
>
> * * *
>
> The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated; like a claim for damages in contract or in tort. It is likewise immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the rēs within its borders, its seizure at the commencement of procedings, and the opportunity of the owner to be heard" (243 U. S. at 271-272).

It is also the law that the attaching State determines the constituents of an attachable *res* (*Huron Corp.* v. *Lincoln Co.*, 312 U. S. 183; *United States* v. *Miller*, 229 F.2d 839).

Respecting the attachment of liability insurance policies specifically, the New York Court of Appeals in deciding the motion for reargument of *Simpson*, made it crystal clear that a plaintiff's judgment cannot exceed the face value of the policy, even if the insurer undertakes a full defense on the merits. The action remains *in rem* in character. In this connection, appellant is plainly in error when it states, on page 2 of its supplemental brief, that under *Seider* the judgment can exceed policy limits but that recovery thereunder in New York, is limited to the policy proceeds. Appellant's distinction between the terms "judgment" and "recovery", where no such result was ever intended by the Court of Appeals is merely appellant's

way of attempting to preserve its initial argument, advanced before the *Simpson* reargument, that the attachment would, after an appearance, affect the insured *in personam*. On reargument, that issue was laid to rest in the insured's favor, and appellant is obviously well aware of it.

Thus it is that an insured can have no vested interest in resisting an attempt by its insurer to defend a lawsuit embraced within the terms of the insurance policy. Accordingly, the insurer would have every right to expect the insured's full cooperation in the defense of the lawsuit and the insured could hardly claim, under such circumstances, that compulsion to cooperate under penalty of forfeiture of policy rights is somehow constitutionally unfair. Surely, New York's interest in demanding cooperation respecting a lawsuit commenced by a resident, in which a New York insurer is involved, is—at very least—equal to the interest of a non-resident insured to control the defense of a claim which is covered in full by insurance (*Pennoyer* v. *Neff*, 95 U. S. 714; *Simpson* v. *Loehmann*, 21 N.Y. 2d at 311).

Appellant further claims that whether or not the judgment in the instant action may exceed the proceeds of the policy, at very least that judgment would be *res judicata* on the issue of negligence in any subsequent *in personam* action appellee may institute to recover the difference between his actual damages and the face amount of the policy.

It may be that the New York judgment should not, in all fairness, preclude the insured from relitigating the liability issues, inasmuch as it was compelled to appear in New York in order to preserve its policy rights. On the other hand, it may be that having had a full opportunity to litigate the liability issues, due process does not demand that the insured be given a chance to try out these issues anew, no matter the basis upon which jurisdiction was acquired in the initial suit. The resolution of such an issue, however, must of course await the institution of a second action and the assertion therein of a claim that *res judicata* applies. Surely, New York has not yet reached the question, much less has it purported to resolve it. Appellant's anticipation—for argument purposes strictly—of an unfavorable ruling in a subsequent lawsuit in the insured's home state of Maryland is rather a slim basis for declaring the actual limited ruling in *Seider* v. *Roth* constitutionally unsound.

Conclusion

The Court should dismiss this appeal, or, in the alternative, affirm.

Respectfully submitted,

HARRIET E. GAIR
Counsel for Appellee

SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

Appellant presents its petition for a rehearing of the above entitled cause and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. Additional Factors Exist Which Were Not Presented in the Jurisdictional Statement and Which Demonstrate the Existence of a Substantial Federal Question.

From the *Per Curiam* decision of October 14, 1968 it cannot be determined if the Court's dismissal was based on a conclusion that the case in its present status was not yet ripe for consideration. If this was the basis, two factors not previously presented are important.

1. The plaintiff on September 30, 1967 commenced a suit *in personam* in Baltimore City Court, Baltimore, Maryland against appellant's insured, Lyon Associates, Inc., on the

same cause of action with which the subject New York action is concerned. Therefore, the problems posed in appellant's Jurisdictional Statement and Supplemental Brief are real, not hypothetical.

2. On June 2, 1967 Justice Charles Marks entered the following order in a special proceeding under New York CPLR 6214(d) to compel Hanover to pay the proceeds of the automobile liability policy to the Sheriff of the City of New York:

> "ORDERED, that the petition is granted to extent herein indicated, and it is further
>
> ORDERED, that the petition be and the same hereby is granted to the extent that the levy made upon the insurance policy is continued until 10 days after the entry of judgment in the matter entitled Carl S. Victor v. Lyon Associates Inc. and George W. Drysdale, and it is further
>
> ORDERED, ADJUDGED, AND DECREED, that within ten days after service of a copy of the said judgment with notice of entry thereof, respondent is directed to turn over the proceeds of the insurance policy to the Sheriff of the City of New York; and it is further
>
> ORDERED, that the petition be and the same hereby is in other respects denied."

An appeal from this order was heard concurrently with the subject case by the New York Court of Appeals and was dismissed. If the attachment on appeal here is valid, therefore, this order is final. Under the *Simpson* v. *Loehmann* decisions, 21 N.Y.2d 305 and 21 N.Y.2d 990, the "proceeds of the policy" is its "face value", which is presumably the limit of liability of $20,000. The net result is that all state court modes of review have been exhausted and the amount at

stake has been determined. Unless the defendant-insured and appellant take the risk of defaulting, there is no way that they can test the validity of their constitutional arguments. It would be inequitable to require a default as a prerequisite to full review of the case by this Court.

The existence of two suits by Victor on the same cause of action is a reality here. In an ordinary situation where both suits are *in personam,* the insurer's contractual rights are not involved. A trial and judgment in one action will be *res judicata* in the other so that the really onerous defense cost of trial only need be borne once by the insurer. Here, however, various trial judges and commentators[1] have concluded that the second *Simpson* decision eliminates the risk to the insured of a personal judgment if he defends in New York on the merits. If this conclusion is correct, then regardless of the outcome in New York, the judgment, being *in rem* only, cannot be used to estop a second trial on the merits in Baltimore. The insurer, therefore, is forced to provide two full and complete defenses to the same cause of action. Thus, New York under the guise of attachment has changed the duty of the insurer under the policy to defend. As written, the policy only requires the insurer to defend "... any suit *against* the insured ..." The *in rem* action in New York, however, is not against the insured. If the conclusion with respect to the second *Simpson* decision is correct, the suit is against the insured's interest in the policy and the insured is not personally before the Court.[2] This change by New York of the contractual duty

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[1] See, e.g., *Jarvik* v. *Magic Mountain Corp.*, —— F. Supp.——, Docket No. 68 Civ. 395, SDNY. Opinion of McClean, J. dtd. Sept. 25, 1968, Appendix p. 1a; Seigel, 7B McKinney's CPLR, § 5201, Cum. Supp. 1968-69, p. 15 et seq.

[2] Anything attached, of course, really belongs to the insurer (Hanover). The duty to defend is the insurer's right under the conditions of the policy, a right to defend the insurer's treasury against untoward claims.

with respect to defense is a further instance of the interference by New York in a foreign contract of insurance which is in addition to the interference depriving the insurer of its rights under the policy's "No Action" clause. Such interferences with the rights of the insurer under this foreign policy of insurance violate constitutional rights of due process, as discussed in Appellant's Jurisdictional Statement, p. 10.

2. The Second *Simpson* Decision Does Not Relieve the Insured of the Danger of *in personam* Liability if It Defends on the Merits in New York.

As noted above, it has been assumed that the second *Simpson* decision, 21 N.Y.2d 990, removes the possibility that the judgment of the New York court will be used *in personam* against the insured in a second action in another jurisdiction (e.g. Maryland) to recover amounts in excess of the policy limits. It is submitted, however, that this assumption is incorrect.

In the second *Simpson* decision the New York Court of Appeals said that ". . . there may not be any *recovery against the defendant* in this sort of case *in an amount greater than the face value of such insurance policy* even though he proceeds with the defense on the merits. Consideration of CPLR 320(c) and its effect generally must, of course, await future cases." (Emphasis added) 21 N.Y.2d at p. 991.

The Court of Appeals by this decision did not judicially repeal CPLR 320(c), which requires the defendant to submit to *in personam* jurisdiction in order to defend on the merits. It is, therefore, as likely that the intent of the Court was to retain CPLR 320(c) and consider the defendant personally before the Court, but restrict the amount of any recovery against the defendant to the policy limits. If

this is so, then the dilemma which caused Judge Croake to declare the attachment unconstitutional in *Podolsky* v. *Devinney*, 281 F. Supp. 488 (1968), still exists. Any New York judgment will be *res judicata*, at least on the question of liability, in the second action.

3. The Second *Simpson* Decision Does Not Remove the Constitutional Problems With Respect to the Rights of the Insurer.

In the *Simpson* case, *supra*, the moving party was the insured defendant. The insurer did not appear. Therefore, in the second *Simpson* decision on rehearing the New York Court of Appeals did not consider the rights of the insurer. In the present case the moving party is the insurer, Hanover, and it is its rights which must be considered.

Substantial due process questions with respect to the insurer are presented. The first is whether the action of the State of New York in nullifying the "No Action" clause and otherwise changing the terms of the foreign insurance policy violate due process under the rationale of *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930). The second question is whether New York can constitutionally allow a direct action against an insurer in the present circumstances under *Watson* v. *Employers Liability Insurance Co.*, 348 U.S. 66 (1954). Finally, the expansion of constitutional *in personam* jurisdiction under the "long arm" statutes necessitates an examination of *in rem* jurisdiction and an evaluation as to whether such jurisdiction violates ". . . traditional notions of fair play and substantial justice . . ." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). These substantial federal questions are discussed at length in the dissent of Burke, J. in the original *Simpson* decision 21 N.Y. 2d at 317. Cases subsequent to the second *Simpson* decision recognize that these con-

stitutional questions still exist with respect to the insurer's rights. See, e.g. *Jarvik* v. *Magic Mountain Corp.*, —— F. Supp. —— (SDNY, 1968) (App. pp. 2a, 3a).

CONCLUSION

The constitutional questions arising from the attachment in New York of liability insurers' duties in order to obtain jurisdiction over non-residents are novel and are the subject of many suits pending in New York and Federal courts, both trial and appellate. (At present at least one case, *Minichiello* v. *Rosenberg,* Docket No. 32534, has been argued and is awaiting decision in the U. S. Court of Appeals, 2nd Circuit.) Until these constitutional questions are fully considered by this Court enormous amounts of legal and judicial expense will be incurred in dealing with these cases and litigants will be forced to take actions which may be irrevocably prejudicial while their rights remain uncertain. It is respectfully submitted that the subject appeal fairly presents substantial federal questions which are ripe for full consideration by this Court and that such full consideration by the Court is necessary to avoid further harm to appellants and other litigants in the New York attachment suits.

For the foregoing reasons, it is respectfully urged that the petition for rehearing be granted and that jurisdiction be noted.

FLORINDO M. DEROSA
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FRANK A. CELENTANO
Counsel for Appellant

PETER J. MALLOY, JR.
Of Counsel

Certificate of Counsel

I, Peter J. Malloy, Jr., one of the counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Counsel for Appellant

Opinion by McLean, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 395

Civ. Mot. Cal.

May 28, 1968

No. 5

LAURENCE JARVIK, an infant, by his father and natural guardian MURRAY JARVIK and MURRAY JARVIK,

Plaintiffs,

—against—

MAGIC MOUNTAIN CORPORATION,

Defendant.

McLEAN, *D.J.*

This motion by defendant to dismiss this action for lack of jurisdiction again raises the question considered by Judge Croake in *Podolsky* v. *Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968) of the constitutionality of the New York attachment rule announced in *Seider* v. *Roth*, 17 N.Y.2d 111 (1966) and reaffirmed in *Simpson* v. *Lochmann*, 21 N.Y.2d 305, 287 N.Y.S.2d 633 (1967).

The action was begun in the Supreme Court, Bronx County, and was removed by defendant to this court on the ground of diversity of citizenship. It seeks recovery for personal injuries allegedly sustained by the infant plaintiff,

Laurence Jarvik, on a ski chair lift operated by defendant in Londonderry, Vermont. Laurence's father, plaintiff Murray Jarvik, sues for medical expenses and loss of services.

The Jarviks are New York residents. Defendant is a Vermont corporation which does not do business in New York. Hartford Accident & Indemnity Insurance Company, a Connecticut insurance company, issued in Vermont a policy of liability insurance to defendant. Hartford Accident does business in New York. Prior to the removal of the action, the Supreme Court, Bronx County, issued an order of attachment against the property of defendant. This was served upon Hartford Accident in New York. Under the *Seider* rule, this service conferred jurisdiction *quasi in rem* over defendant's property in New York, the "property" consisting of the insurance company's obligation under its Vermont policy to defend the suit and indemnify defendant against liability up to the face amount of the policy.

I agree with the criticism of the *Seider* rule voiced by Judge Breitel in *Simpson* (278 N.Y.S.2d at 640). To my mind the rule is unsound in theory and unfair in operation. It is, however, the law of New York and in this diversity case it is the duty of this court to apply the New York law unless it is unconstitutional.

In *Podolsky*, Judge Croake held that the New York rule is unconstitutional. In that case the rule was attacked, not only by the nonresident defendant, but also by the insurance company in its own right. Judge Croake considered the predicament in which both found themselves as a result of this doctrine, a dilemma which is particularly unjust in the case of the insurance company (see 281 F. Supp. at 499). As to the insured, Judge Croake emphasized the problem arising from what had been supposed to be the New York rule (see CPLR §320(c)) that a defendant who appears in

the action to defend his attached "property" thereby confers upon the court complete jurisdiction over his person, with the resulting risk of a personal judgment in excess of the face amount of the insurance policy (see 281 F. Supp. at 498).

In the present action, only the nonresident defendant, not the insurance company as such, attacks the constitutionality of the rule. Moreover, after Judge Croake's decision, the New York Court of Appeals appears to have changed the law of New York as to the effect of an appearance. In an opinion apparently as yet unpublished, denying a motion for reargument in *Simpson*, the Court of Appeals said:

> "This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy *even though he proceeds with the defense on the merits.* Consideration of CPLR 320(c) and its effect generally must, of course, await future cases." (Emphasis supplied.)

In my opinion this change in the New York law changes the result on this motion. The nonresident defendant no longer runs the risk of a personal judgment against him by appearing in the New York action. Viewing the question solely from his point of view rather than from the point of view of the insurance company, as we must on this motion, it is hard to see how he is deprived of property by defending the New York action.

In *Simpson*, the New York Court of Appeals upheld the constitutionality of the *Seider* rule. Even Judge Breitel, despite his strong views on the unsoundness and unwisdom of the rule, was not persuaded that it violated

due process. I cannot say that this New York decision on the constitutional point is so clearly wrong as to justify this court in refusing to follow it in a diversity case. Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

Defendant also moves under 28 U.S.C. §1404(a) to transfer this action to the United States District Court for the District of Vermont. The relevant factors are as follows.

The accident happened in Vermont. The ski tow which was the scene of the accident is located there. Defendant and all its witnesses reside there. Plaintiff Laurence Jarvik received hospital treatment in Vermont and the medical records of that treatment are to be found there.

On the other hand, plaintiffs are New York residents. It is said that Laurence received medical and hospital treatment in New York. The nature of this treatment and the identity of those who provided it is not specified, beyond the fact that Laurence's parents, one of whom is also a plaintiff here, are physicians.

Plaintiffs' attorney says that it will be an "undue hardship" upon Laurence to require him to "travel to a distant state for his day in court." This argument does not impress me. Vermont is not very distant from New York. There is no claim that Laurence's physical condition makes it dangerous for him to make the journey.

Defendant says that if this action is transferred to Vermont, defendant will appear generally in the action. This is an important factor, for obviously such an appearance will be of benefit to plaintiffs.

After weighing all the factors, I conclude that those in favor of transfer preponderate. This is essentially a Vermont case. It was possible to bring it in New York only

because of the coincidence that defendant's insurance company has an office here. Moreover, this is not a situation in which a New York resident, while temporarily passing through Vermont on his way home, is injured in, say, an auto accident. Here plaintiffs deliberately went to Vermont for the purpose of using defendant's equipment which is permanently installed there. Under these circumstances, it is not unreasonable to require that their claim arising out of the use of that equipment be prosecuted in Vermont.

In the interest of justice, defendant's motion to transfer this action to Vermont is granted, on condition that defendant appear generally in the action once it has been transferred.

Defendant's third motion, i.e., to strike the note of issue or to extend defendant's time to object to it, is rendered moot by the decision to transfer the action and accordingly, is denied on that ground.

Settle order on notice.

Dated: September 25, 1968

/s/ E. McLean
U.S.D.J.

SUPREME COURT OF THE UNITED STATES

October Term, 1908.

HANOVER INS. CO. OF NEW YORK *v.* VICTOR.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 80. Decided October 14, 1908.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.